

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:

In the matter between:

CORRUPTION WATCH (RF) NPC

Applicant

and



ESKOM HOLDINGS SOC LIMITED

First Respondent

MARK VIVIAN PAMENSKY

Second Respondent

ANOJ SINGH

Third Respondent

BRIAN MOLEFE

Fourth Respondent

VENETE JARLENE KLEIN

Fifth Respondent

ZETHEMBE WILFRED KHOZA

Sixth Respondent

MINISTER OF PUBLIC ENTERPRISES

Seventh Respondent

**INDEX
VOLUME 7**

	Volume 7:	
1.	"DL28": Full background to transaction	972
2.	"DL29": Media articles	996
3.	"DL30": Board Tender Committee meeting submission document- 11 April 2016	1004

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4.	"DL31": Eskom press release	1005
5.	"DL32": note 52 of Eskoms financial statements	1010
6.	"DL33": Letter to the DBSA- 7 July 2017	1019
7.	"DL34": 14 July 2017 letter from DBSA	1021
8.	"DL35": letter from DBSA-19 July 2017	1024
9.	"DL36": letter from Eskom to DBSA-25 July 2017	1026
10.	"DL37": Letter to Eskom, dated 26 July 2017 from DBSA,	1027
11.	"DL38": letter from Eskom- 28 July 2017	1029
12.	"DL39":, letter to the former Minister- 16 October 2015	1035
13.	"DL40": letter from Minister to Eskom- 1 November 2015	1037
14.	"DL41": 25 November 2015, correspondence from Eskom to the former Minister	1039
15.	"DL42": Molefe statement - 23 April 2017	1041
16.	"DL43": Eskom correspondence -11 May 2017	1043
17.	"DL44": High Court Judgement dated 25 January 2018	1052
18.	"DL45": 9 February 2016- People and Governance Committee meeting minutes	1079
30.1	"DL46": Media statement dated 11 November 2016	1080

DATED at Johannesburg on this 17th day of NOVEMBER 2018



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AND TO : ESKOM HOLDINGS SOC LIMITED
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AND TO: ANOJ SINGH
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AND TO: **BRIAN MOLEFE**
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AND TO: **ZETHEMBE WILFRED KHOZA**
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AND TO: **MINISTER OF PUBLIC ENTERPRISES**
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Annexure

Background to the acquisition of Optimum by Tegeta and subsequent payments from Eskom to Tegeta

11. On 4 January 1993, Eskom entered into a Coal Supply Agreement with Trans-Natal Coal Corporation Limited and Trans-Natal Collieries Limited (Operations of Optimum Collieries were transferred to this holding company). The material terms of the agreement include the following:

11.1. Optimum collieries would supply coal to the Hendrina Power Station;

11.2. the agreement would endure until 31 December 2008, with Eskom having the option to extend this agreement to 31 December 2018;

11.3. the specifications and the quality of coal to be supplied to the Hendrina Power Station were stated; and

11.4. a hardship clause provided that, should a party to the agreement suffer hardship and the relevant circumstances arise, the other party would be obliged to enter negotiations and resolve the hardship being suffered and negotiate new terms for the agreement. The hardship clause further provides for referral to arbitration in circumstances where negotiations cannot be concluded.

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12. Optimum Collieries was later sold by BHP Billiton Energy Coal South Africa Ltd to OCH and OCM, owned by Glencore. Eskom was required to consent to the sale and granted such consent on condition that OCM and OCH agreed to new terms and conditions to the CSA.
13. These new terms and conditions were contained in the First Addendum to Hendrina CSA ("**First Addendum**") between Eskom Holdings Limited and OCH and OCM.
14. The First Addendum also set out new requirements with regards to the quality of coal being supplied. Clauses 3.4.4 and 3.4.5¹ provided for any Party to raise concerns about the quality of the coal from Optimum Colliery, to raise such concerns and re-negotiate the specification of the coal.
15. A further clause dealing with Payment Rejection provided that, if the coal provided does not meet the agreed quality parameters for any seven-day rolling period, then Eskom would have the option to pay R1 per tonne until such a time as the quality parameters are met.²

¹ "3.4.4 In the event that any of the Parties shall, at any time, be or become of the view that the specification clauses 3.4.2 and 3.4.3 shall not be properly and/or realistically representative of the coal which Optimum Colliery shall reasonably be expected (in the event that it were to conduct its operations in a proper manner and in accordance with best industry standards) to achieve from the exploitation of the coal deposits constituting the Optimum Colliery, such Party shall be entitled to notify them that it wishes to re-negotiate such specification.

3.4.5 On being so notified, the other Party shall enter into discussions and negotiations in good faith with the first Party, in order to reach agreement in respect of the amendment of such specification."

² Clause 3.6.1.5 states as follows: "Payment Rejection"

"a). In the event that any Quality Parameter shall fail to have been met for any seven day rolling period, the purchase price payable by Eskom to Optimum Colliery in respect of the coal (which shall not comply with the Quality Parameters) on the seventh day of such period and/or any subsequent consecutive day on which the Quality Parameters, or either of them, shall fail to have been met, shall be reduced to R1-00 per tonne."

16. The CSA was also extended to 31 December 2018, and referred to an additional coal supply period.
17. Subsequently, Eskom and OCM by way of arbitration both agreed to amend the CSA.
18. A Second Addendum to the Hendrina CSA ("**Second Addendum**") was then entered into. The pertinent clauses of the Second Addendum stipulated that: The price payable by Eskom per tonne of coal would be R115.00 per tonne on an escalation basis as set out in the CSA.
19. The intended commencement date would be 01 April 2011.

Eskom's refusal to conclude Co-operation Agreement with OCM

20. On 22 April 2013, Eskom addressed a letter to OCM raising concerns about the sizing specification. OCM responded the day after, confirming that they had made several enquiries about the reason for the change in the sizing of coal which they were required to supply and that they wanted to re-negotiate the specifications with Eskom as provided for in Clause 3.4.4 and 3.4.5 of the First Addendum.
21. On 3 July 2013, OCM sent a letter to Eskom formally invoking the hardship clause of the Hendrina CSA. The contents of the letter were *inter alia* as follows:
 - 21.1. the difference between the cost to produce coal and the selling price to Eskom was approximately R166.40;



21.2. it expected to lose R881 million during the course of 2013 due to the sale of coal to Eskom in terms of the CSA; and

21.3. it wished to agree to mutually acceptable amendments to the CSA in order to resolve their hardship.

22. Protracted negotiations took place thereafter resulting in a co-operation agreement being signed on 23 May 2015, ("**Co-operation Agreement**"). The Co-operation agreement provided for terms and conditions to govern further negotiations between the parties.

23. On 13 November 2014, OCM addressed a letter to Eskom noting that the negotiations as per the Co-operation Agreement had not progressed adequately and at a sufficient pace, and that OCM was consequently considering shutting down their operations.

24. The letter further gave Eskom proposed solutions in terms of which coal would be supplied to Eskom for the period January 2015 to December 2018 at cost and for the period January 2019 to December 2023 at cost plus an agreed upon margin.

25. There were additional proposals made by OCM in the letter which sought to give Eskom a form of economic benefit in renegotiating with them. In concluding, OCM further stated the following:

"neither Eskom nor OCM can accept the highly damaging situation whereby OCM ceases operating. As a result, there is no option other than Eskom and OCM reaching agreement to amend the Hendrina coal supply agreement. OCM believes that Eskom understands this



but is not willing to conclude an agreement because it has residual concerns regarding OCM and Glencore's bona fides and whether the position really is as severe as OCM has alleged. OCM believes that it has acted in the utmost good faith and with full transparency, beyond what would normally be expected from a commercial counterparty, to identify a solution which is fair and reasonable for both parties. This letter includes further proposals in this regard. If Eskom is still not satisfied, then we implore Eskom urgently to engage with us so that we can seek to address and resolve Eskom's concerns and move towards an agreement."

26. Subsequent to this letter, a further draft agreement was concluded in terms of which, Eskom and OCM agreed that there would be a new negotiated price for the supply of coal and new specifications agreed upon for the quality of the coal to be supplied to the Hendrina Power Station (the "**Draft Fourth Addendum**").
27. OCM and the Eskom's negotiating team had agreed to the increase of the price of coal from 1 April 2015 to 31 December 2018 to cost (which costs were audited extensively by Eskom and its advisers). The additional terms agreed upon would also include an extension of the agreement beyond 31 December 2018 for a 5 year period, whereby the price of coal would be cost plus an agreed upon margin.
28. On 15 April 2015, the Procurement Sub-Committee of the Board considered the matter and decided that it was not able to make a decision and referred the matter to the full Board for decision.
29. On 23 April 2015, a Board Meeting took place at the Eskom Bellville Offices in Cape Town at which the Board was called to consider the referral from the Board Tender Committee for approval of the mandate to conclude negotiations with Optimum Coal Mine for Coal Supply to Hendrina Power Station, details of



which had been circulated to members.

30. The following board members were present during said meeting:

30.1. Zethembe Wilfred Khoza (Non-Executive Director);

30.2. Nazia Carrim (Non-Executive Director);

30.3. Venete Jarlene Klein (Non-Executive Director);

30.4. Chwayita Mabude (Non- Executive Director);

30.5. Devapushpum Naidoo (Acting Chairman);

30.6. Baldwin Sipho Ngubane (Non-Executive Director);

30.7. Mark Vivian Pamensky (Non-Executive Director); and

30.8. Romeo Khumalo (Non-Executive Director).

31. It was requested that the submission be taken off the Agenda and submitted to the Acting Chief Executive before being tabled for approval.

32. The members of the Eskom board resolved the following in relation to the above-mentioned matter:

32.1. the Referral from the Board Tender Committee for approval of the mandate to conclude negotiations with Optimum Coal Mine for Coal Supply to Hendrina Power Station is not approved; and

32.2. the mandate should be referred to the Acting Chief Executive prior



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to being tabled before the Board for approval.³

33. In terms of a letter from OCM to Eskom dated 22 May 2015, OCM confirmed that Eskom's negotiating team and OCM had concluded a new deal for the supply of coal and that on 18 May 2015; the CEO of OCM met with the Acting CEO of Eskom (Brian Molefe) who advised that Eskom would not be concluding any deal with OCM and would continue enforcing the existing coal supply agreement.
34. The letter further indicated that OCM have exhausted all available banking facilities and would be forced into business rescue and that even in business rescue, the only possible way to save the business would be to re-negotiate the contract for the supply of coal to the Hendrina Power Station.
35. An important extract of the letter reads as follows:

"Eskom's negotiating team advised OCM that the terms of the deal were subject to approval by the Executive-Procurement Committee and then the Eskom Board Procurement Sub-Committee. On 25 March 2015, OCM was advised that the Executive-Procurement Committee had approved the terms of the deal. Thereafter, OCM were advised that the deal was presented to the Procurement Sub-Committee of the Eskom Board on 15 April 2015, but the sub-committee was not willing to make a decision and had referred the matter to the full Eskom Board for consideration. We understand that on 23 April 2015 the full Eskom Board did not make a decision and requested further information. Following such board meeting, OCM continued to engage with Eskom in the expectation that the deal was still supported by Eskom and that the negotiations with Eskom would result in some deal, perhaps on amended terms, being concluded. On 18 May 2015, the CEO of OCM met with the Acting CEO of Eskom, who advised that Eskom would not be concluding any deal with OCM and would continue enforcing the existing coal supply agreement."

³ Minutes of Board meeting summarised in Public Protectors Report at page 142-143.

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36. On 10 June 2015, Mr Molefe, as acting CEO of Eskom wrote to OCM, confirming that due to Eskom's financial position, it was unable to re-negotiate the contract and that the settlement process envisaged in the Co-operation agreement had terminated. The letter stated:

"We acknowledge receipt of your letter dated 22 May 2015 and the issues you raise in it. However, considering Eskom's current financial position, which is public knowledge, we unfortunately cannot afford to reset the contract price, to that proposed by Optimum Coal Mine.

It remains priority for Eskom, to ensure the security of the coal supply to Hendrina Power Station not only for the remainder of the current coal supply agreement but also for the remaining life of Hendrina Power Station. Therefore it remains critical to all stakeholders that Optimum Coal Mine continues to deliver coal as per the current contract.

Eskom, to the extent that the Co-Operation Agreement still regulates the settlement process hereby notifies Optimum Coal Mine in terms of clause 5.6 of the Agreement that it no longer wishes to participate in the settlement process. Eskom accordingly hereby terminates the settlement process and confirms that the provisions of the CSA and addenda are forthwith applicable in respect of; inter alia, coal qualities and quantity requirements of the Hendrina Power Station.

However, the negotiation teams should continue to negotiate a new CSA for after 2018, in respect of the remaining life of Hendrina Power Station."

Eskom exerts further pressure in demanding immediate and full payment of fines from OCM

37. On 23 June 2015 OCM responded to say that since the settlement process had terminated; the hardship clause in the CSA would be invoked.

38. On 1 July 2015, Glencore received a letter from KPMG Services (Pty) Ltd, in



which they stated that they had been requested by one of their clients who at the time wished to remain anonymous. The purpose of the letter was an expression of interest to purchase either OCM or OCH. Further contents of the letter stated that:

38.1. Their clients wish to purchase OCM and/or all shares in OCH for R2 billion.

38.2. With regards the financing, the letter stated as follows:

"Our client has held discussions with its bankers regarding their capacity to fund the acquisition of Optimum Coal. Based on their existing business operations and assets (i.e. without recourse to the assets of Optimum Coal), they have received written letters of support for the required funding, which together with case resources, would allow them to fund the proposed purchase price of R2 billion, without recourse to the assets of Optimum Coal."

38.3. The letter further stated that "the senior management of our client and the majority shareholder have approved our release of this Expression of Interest".

39. On 16 July 2015 a letter was sent by Cliffe Dekker Hofmeyr ("CDH") on behalf of Eskom to OCM. CDH on behalf of Eskom demanded repayment in respect of coal which failed to comply with the quality specification of the CSA for the period 1 March 2012 to 31 May 2015. This letter stated that:

39.1. Since the settlement process in the Co-operation Agreement has terminated, Eskom is entitled to recommence with the implementation of penalties and/or payment reductions;

39.2. That OCM had failed to comply with coal specifications during the

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period 1 March 2012 to 31 May 2015; and

- 39.3. That the reduction Eskom is entitled to impose on the purchase price to OCM amounts to R2, 176,530, 611.99 (two billion one hundred seventy-six million five hundred and thirty thousand six hundred and eleven rand and ninety-nine cents).
40. On 31 July 2015 the Board of OCH placed OCH in business rescue and appointed business rescue practitioners ("BRP's") who took full management control over the company in substitution for its board of directors in terms of section 140(1) of the Companies Act.
41. On 4 August 2015, Piers Michael Marsden ("Mr Marsden") and Petrus Francois van den Steen ("Mr van den Steen") were appointed as joint BRP's for OCH.
42. On 5 August 2015, notice of the appointment of the BRPs was delivered to affected persons.
43. In a letter sent by CDH on behalf of Eskom to Werksmans dated 5 August 2015, Eskom confirms that it wishes to proceed with arbitration proceedings in terms of the First Addendum of the CSA. It further acknowledges that OCM and OCH have been placed in business rescue and requests Werksmans to engage with the BRPs with regards to the arbitration.
44. On 5 August 2015, summons was issued on OCM and OCH by Eskom. The summons was for Eskom's claim for R 2,176,530,611.99. Eskom alleged that OCM had provided it with defective coal; hence, the claim of the said amount for



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damages.

45. On 6 August 2015, a letter was sent from Werksmans (on behalf of the BRP's) to CDH in which they noted that in terms of section 133 of the Companies Act, no legal proceedings may be lodged against a company in business rescue. The letter further noted that the claim should be against the BRP's.
46. On 7 August 2015, a letter was sent from the BRPs to Mr Molefe as well as other individuals at Eskom. The content of the letter was as follows:
- 46.1. The BRPs have reviewed the CSA with Eskom as well as correspondence between Eskom and OCM over a two year period;
 - 46.2. Eskom will be a key stakeholder throughout the business rescue proceedings of both companies; and
 - 46.3. An urgent meeting is requested with Eskom in order to discuss the CSA between Eskom and OCM.
47. On 20 August 2015, the BRP's wrote to Eskom to say that the enforcement of the terms of the CSA agreement between OCM and Eskom has forced OCM into financial distress and that such financial position has been exacerbated by Eskom's claim for historical and future penalties. They concluded by saying that all obligations between OCM and Eskom in terms of the CSA are suspended and that they would only be willing to supply coal in terms of negotiated terms which were attached to the letter. The letter states:



"You would further be aware from the notices in respect of the business rescue proceedings, the hardship claim initiated by OCM in 2013 and your extensive engagement with OCM pursuant to the settlement process conducted in terms of the co-operation agreement between Eskom and OCM dated 23 May 2014 ("Co- Operation Agreement") (which settlement process Eskom terminated on 10 June 2015), that the principal reason for the commencement of OCM's business rescue proceedings is the financial distress that the terms of the CSA have placed, and continue to place, on OCM. The financial position of OCM was clearly communicated to Eskom on numerous occasions prior to the commencement of OCM's business rescue proceedings in both written correspondence and in formal meetings held between representatives of OCM and Eskom. This financial position has been exacerbated by Eskom's recent claim for historical and future penalties which, if upheld, will effectively result in OCM supplying coal to Eskom at R1 per ton."

"....Marsden and Van den Steen can no longer allow OCM to continue performing the CSA on its current terms. This is even more the case given Eskom's failure to timeously make payment for coal delivered to Eskom in July, notwithstanding that Eskom confirmed in writing on 14 August 2015 that Eskom would make such payment. The non-payment of amounts due constitutes a breach of the CSA, and our clients reserve all of their rights in this regard".

48. Due to the above circumstances, the BRP's suspended all obligations of OCM in terms of the CSA.
49. The BRP's stated that they were willing to supply coal to Eskom on terms which were sustainable for OCM. The BRP's went further and attached to the letter an interim agreement, which was based on the initial negotiations between Eskom and OCM. The interim agreement would see OCM supply coal to Eskom at the cash cost of production for OCM. The agreement would further see Eskom paying on a weekly basis.
50. Following further correspondence, on 24 August 2015, Eskom confirmed that for a variety of reasons related to cost, quality and payment methodology they

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were not able to accept the BRP's interim arrangement and that Eskom would be willing to engage with the BRP's if the coal supply to the Hendrina Power Station resumed.

51. On 24 August 2015 a letter was sent by Werksmans on behalf of the BRP's confirming that OCM does not have sufficient funding to continue supplying coal under the current CSA and accordingly requested that Eskom that supply it with post commencement funding in order for OCM to continue to supply coal to Hendrina.
52. On 3 September 2015, a meeting between Mr Clinton Ephron of Glencore, the BRP and the CEO of Eskom was held.
53. It was agreed that OCM shall with effect from 4 September 2015 re-commence the supply of coal to the Hendrina Power Station for a period of 60 days on the following basis:
 - 53.1. As per the CSA;
 - 53.2. coal quality of 458 333 thousand tons per month;
 - 53.3. coal qualities in terms of the suspended 1993 CSA and addenda thereto, save for the relaxation of the sizing specification as recorded herein for convenience.
54. In respect of the 60 days arrangement, it was recorded that:
 - 54.1. Eskom shall suspend the imposition of any penalties in respect of



coal which fails to meet the quality specification. In that regard the power station and Optimum mine was required to continue on a daily, weekly and monthly basis to comply with all sampling and contractual requirements as required by the suspended CSA, including to provide Optimum with the required notices for non-compliance;

54.2. Eskom shall on a weekly-basis within three (3) days from the date of receipt of an invoice from Optimum, make payment to Optimum for such coal supplied and delivered to the Hendrina Power Station during the preceding seven (7) days.

55. On 17 September 2015, the BRP's sent Eskom a settlement proposal which involved the extension of the contract to enable a price averaging, a reasonable settlement of the alleged penalties and the implementation of a BBEEE transaction to make OCM a majority black owned company.

56. On 19 September 2015, CDH on behalf of Eskom confirmed that OCM will re-commence the supply of coal on certain conditions to be agreed upon between the CEO of Eskom and the BRP's.

57. On 21 September 2015, a meeting was held between OCM and Eskom. At the meeting it was agreed that:

57.1. The agreement to re-commence coal supply to Eskom is on condition that discussions resume regarding the CSA.


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57.2. There will be no sizing quality specifications or any penalties levied during the 60 days period.

58. The BRP's further stated: *"We note that we do not accept that the power station has any difficulties with coal which does not comply with the quality specification contemplated by clause 3.4.3 of the First Addendum and we reserve all our rights arising from the notice served by OCM on Eskom in terms of clause 3.4.4 of the First Addendum on 23 April 2013."*

59. On 30 September 2015, a letter was sent from Eskom to OCM and BRP's confirming that Eskom was not prepared to entertain the settlement proposal, that any negotiation on the new contract price for coal would only be considered in 2017 and that the penalty claim is non-negotiable and should be settled in full.

60. On 21 September, a letter was sent from Oakbay to the BRP's offering to purchase OCM. A subsequent meeting was held between the parties on 29 September 2015 regarding the offer to purchase OCM.

61. On 7 October the BRP's wrote a letter to Oakbay informing them that they have received an offer from a third party on more favourable terms and cannot engage with them further.

62. A meeting was held on 20 October 2015 between the BRP's and Oakbay where the offer to purchase OCM was once again discussed.

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63. A letter was sent by the BRP's to Oakbay on 23 October 2015 informing them that they were willing to proceed with the transaction subject to certain requirements and that only OCM was for sale.

Eskom facilitates discussions for sale of OCM

64. Between October and November 2015, the BRP's discussed the available options with Matshela Koko at Eskom. These options included the sale of OCM to a third party although a significant obstacle included the large debt owed by OCM to a consortium of banks. Due to the high operating costs of OCM, the BRP's did state that the option of liquidating OCM may need to be considered.
65. On 5 November 2015, Koko wrote to OCM indicating that Eskom would be open to a roundtable with OCM and the proposed buyer.
66. The BRP's wrote a letter to Eskom dated 13 November 2015. The contents of the letter were *inter alia* as follows:

66.1. The BRP's acknowledge and confirm the importance of maintaining Coal Supply to Hendrina Power Station and that the continued supply of coal to Hendrina Power Station was the purpose of its engagements with Eskom, with the view of finding a solution to the CSA.

66.2. The BRP's confirm that Oakbay had commenced the due diligence process on OCM. The BRP's state that they are hopeful of concluding a transaction with Oakbay with the consent of

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Eskom.

66.3. Exploratory Discussions on Sustainable Hendrina Coal Supply took place on 24 November 2015 (between OCM and Oakbay).

66.4. The meeting was chaired by Eskom's Mr Matshela Koko.

67. The purpose of the meeting was to seek the support of Eskom for the sale of OCM to Oakbay. Oakbay confirmed that a due diligence process had begun and that they hoped that an agreement would be in place on 15 November 2015.

68. I wish to bring to the above honourable courts attention the following paragraphs from the minutes to the meeting held between the parties, which are of particular importance and read as follows:

"The Chairman emphasised Eskom's position: Eskom's priority is security of supply. There is a coal supply contract in place until 2018. Eskom expects Optimum Coal Mine to honour the contract at the contracted price until 2018. Eskom will not waive its penalty claim.

He noted that Koornfontein supply contract expires in December 2015. It appeared that the Koornfontein disposal and that of the export allocation are separate to that of OCM. This gave rise to the question of how does OCH survive beyond the life of the Koornfontein contract. He further questioned the financial strength of the new buyer; firstly would it be able to sustain a loss of ZAR 130M per month and secondly, how will the buyer survive without the Koornfontein Contract and the export allocation? He postulated that if OCM were to be ring-fenced, Eskom was not convinced that it will survive on its own and hence he was compelled to engage in a discussion regarding OCH, and not OCM, in totality. PM indicated that the BRP's view of the claim differed to that of Eskom. In addition, there was a ZAR 2.7bn of senior secured bank debt held by the banking consortium which will need to be evaluated by Oakbay. The BRP has had open discussions with Oakbay on this debt. PM confirmed that there was no engagement around OCH solution and from a Glencore perspective, it may be open to this but at the moment Oakbay was dealing with the transaction from an OCM perspective. NH confirmed that Oakbay was dealing with it from an OCM perspective and that it did not have a

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mandate to talk regarding OCH. It was concluded that Eskom's position was now clear to all parties and that Oakbay required a mandate to take the discussion further. NH requested to reconvene with the Business Rescue Practitioner and Glencore at 17h30 to discuss further. The Chairman reiterated that the parties would not have Eskom consent should it be limited to a transaction at OCM level. While it was supportive of a transaction with Oakbay, it would not be supportive were it to be limited to OCM level. The Chairman insisted that Eskom needs to know by the weekend that there is prospect at an OCH level to rescue the mine."

69. A purchase agreement for the sale of all claims and shares held in OCH to Tegeta was signed on 10 December 2015 which included the sale of all shares held in OCH to Tegeta subject to various approvals.

70. The agreement to sell OCH to Tegeta was agreed in the amount of R2 150 000 000.

71. On 9 February 2016, the BRP's addressed a letter to Eskom in which they made reference to the meeting held on 24 November 2015 which was chaired by Mr Matshela Koko, where *"he raised concerns around the sustainability of Optimum Coal Mine ("OCM") as a standalone business. You further question how OCM could survive without the contribution from Koornfontein Mines Proprietary Limited ("Koornfontein") and the export allocation. You further stated Eskom's position around the need for the continuity of coal supply with particular reference to the existing OCM coal supply agreement"*.

72. The letter goes on to state that there were three requirements relating to Eskom that needed to be satisfied by Tegeta in order for the sale to go through. These requirements were as follows:

"(i) the consent of Eskom to the Agreement;

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(ii) the release by Eskom of OCH from the guarantee that it granted to Eskom in respect of the debts of OCM;

(iii) the release by Eskom of OCH and its past and current affiliates (other than the Target Companies) from liability that may arise from, or that is related to, the Coal Supply Agreement"

73. The letter further states as follows:

"Eskom has requested us, in our capacity as the business rescue practitioners of OCH, to demonstrate the basis upon which we believe that the Agreement presents the most compelling option for, inter alia, the affected persons of both OCH and OCM.

In this regard, we confirm that pursuant to the conclusion of the Agreement, Tegeta presented a turnaround strategy for OCM to us, which- will take effect from the date of the closing of the Agreement (which is anticipated to be 31 March 2016, unless extended pursuant to the terms of the Agreement; and the contribution from Koornfontein and OCH would further improve this sustainability as highlighted by you at the meeting on 24 November 2015."

74. On 10 February 2016 a submission was made, requesting consent to the cession of the CSA between OCH and Eskom to Tegeta and Eskom, to the Board Tender Committee, and signed by Mr Vusi Mboweni (Senior General Manager: Primary Energy), Mr Neo Tsholanku (General Manager: Legal) and Mr Matshela Koko (Group Executive: Generation).

75. The submission drew attention to the risk of Tegeta's possible inability to pay the penalties levied by Eskom to OCH/OCM.

76. Board Members present during this meeting were Mr Z. Khoza (Chairman of the meeting), Ms C. Mabude, Ms D Naidoo and Ms N Carrim.

77. At this meeting a recommendation was made "to enter into the cession and assignment of the coal supply agreement between Optimum Coal Holdings (Pty) Ltd (OCH) and Eskom Holdings SOC Ltd (Eskom) from Glencore Operation South Africa (Pty) Ltd (Glencore) to Tegeta Exploration and Resources (Pty) Ltd (Tegeta).

78. No interests were declared during this Board Tender Committee Meeting. At the meeting it was resolved that:

78.1. Eskom consents to the sale and purchase of shares in OCM;

78.2. Eskom releases OCH from the guarantee given to Eskom;

78.3. Tegeta will need to issue a guarantee in relation to the performance of the CSA; and

78.4. Cession is granted on the basis that all requirements in terms of the purchase agreement have been met.

Eskom enters into CSA with Tegeta on favourable terms

79. A contract was entered into between Tegeta and OCM on 18 February 2016 for the supply of steam coal by OCM to Tegeta, (Sale of Steam Coal-Contract No. 117).

80. The contract was for 400,000 tons of coal for the period February 2016 to April 2016 at a rate of R18.68/GJ plus the negotiated transport rate. The price is exclusive of VAT. Invoicing was to be done upon the delivery of every 50 000 tons of coal.


AGC

81. The delivery point was Eskom's Arnot Power Station.
82. A Special Board Tender Committee Meeting was held at the Huvo Nkulu Boardroom on 7 March 2016 at 18h00. Board Members present during this meeting were Mr Z. Khoza (Chairman of the meeting), Ms C. Mabude, Ms D Naidoo and Ms N Carrim.
83. On 30 March 2016 an agreement was signed confirming that all of the suspensive conditions had been fulfilled in terms of the agreement signed on 10 December 2015.
84. A Fourth Addendum to the Hendrina Coal Supply Agreement was concluded for the purposes of ceding the CSA to Tegeta along with any other obligations towards Eskom. The Fourth Addendum was signed on 30 March 2016.
85. A letter from Eskom dated 30 March 2016 addressed to OCH and the BRP's consented to the cession of the CSA to Tegeta. The letter is signed by Mr V. Mboweni as well as by the BRP's.
86. Paragraph 3 states as follows:

"Eskom hereby irrevocably and unconditionally releases and discharges (and shall procure, to the extent necessary, that each of its past and current Affiliates irrevocably and unconditionally releases and discharges) each Released Party, with effect from the Effective Date from (and, to the extent necessary, Irrevocably and unconditionally waive) all actions, claims, counterclaims, causes of action, debts, obligations, damages, liabilities, rights and demands whatsoever, of whatever kind or nature, in contract or in delict, known or unknown, which Eskom now has or ever had against one or more of the Released Parties that are and/or may be based upon, arise under, or be related to the CSA and/or the Eskom Guarantee (including (but not limited to), for the avoidance of any doubt,

MR
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the claim in the amount of R 2,176,530,611.59 (plus interest calculated at 9% a tempore more) that Eskom alleges to have, amongst others, against OCH and for which it has instituted proceedings against OCH out of the High Court of South Africa, Gauteng Local Division, Johannesburg, under case number 28155/15 ("Penalties Claim")), prior to and including the Effective date."

87. On 11 April 2016, the BRP's received a call from Nazeem Howa, CEO of Oakbay requesting a meeting, which was then held at 10h00 on the same day. The BRP's were advised that Tegeta was R600 million short in respect of the purchase price and requested the BRP's to approach a consortium of banks in order to bridge the loan amount. At 13h30, the BRP's met with the consortium of banks who confirmed that they were not prepared to finance the shortfall of the purchase price.
88. An offer was then made by Tegeta to Eskom for the supply of an additional one million and two hundred and fifty thousand tonnes of coal from the Optimum Coal Mine over a period of 5 months at a rate of R20.41 per gigajoule plus VAT less 3.5% discount.
89. A submission was prepared by Mr Mabelane, Ms Ntete and Mr Koko advancing reasons for the offer to be accepted by the Board of Eskom.⁴

⁴ This submission required the following resolution from the Board:

- 2.1 Addenda to the Short Term Coal Supply Agreements between various suppliers and Eskom be concluded to extend the supply of coal from various sources to Arnot Power Station for up to a further five (5) months and/or such period as may be requested by the supplier but not later than 20 September 2016;
- 2.2 The Chief Financial Officer is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension provided that there is a discount in the price, the supplier offers a guarantee in favour of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom;

Eskom approves R600 million pre-payment to Tegeta

90. On 11 April 2016 at 21h00, a meeting of the Special Board Tender Committee was convened in order to approve the short term coal supply agreements. It was resolved that:

90.1. Short term coal supply agreements between various suppliers and Eskom be concluded to extend the supply of coal from various sources to the Arnot Power Station for up to a further five months;

90.2. The CEO was authorised to approve the basis for the pre-payment to secure the fixed coal price for the period of the extension provided that there is a discount in the price and that the transactions are economically viable for Eskom; and

90.3. The Group Executive for Generation (Koko) was authorised to take all necessary steps to give effect to the resolutions including the signing of any documentation.

91. On 13 April 2016, a meeting was held by the shareholders of Tegeta and a cession and pledge in security agreement was signed by all shareholders of Tegeta pledging their shares to Eskom as security for the pre-payment.

92. On 13 April 2016 an Agreement was signed between Tegeta and Eskom for the pre-payment to Tegeta of R659 558 079.00 in lieu of future coal supply. It was agreed that Tegeta would supply Eskom with coal from the Optimum mine in

2.3 The Group Executive (Generation) is hereby authorised to take all the necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto."



terms of the existing coal supply agreement from 16 April 2016 – 30 September 2016 at a price of R19.69 per gigajoule.

93. The Escrow agent confirmed to the BRP's that the purchase price was made in full into their account, on 14 April 2016.⁵
94. The Public Protector refers to a section 34 report prepared by OCM's BRP's in which they state that the pre-payment was used entirely for purposes of funding the purchase of all the shares in OCH.
95. On 21 June 2016 – The Board Tender Committee approved the negotiation of contracts for the supply of coal to Hendrina Power Station from 31 December 2018 onwards.
96. On 1 July 2016 - in a letter sent on this date, the BRP's confirm that they have learnt from media articles that Eskom had made a pre-payment to Tegeta for the supply of coal from OCM to the Arnot Power Station. The BRP's confirmed that the pre-payment was not made to OCM and that in any event, OCM provides a 30-day payment term to Tegeta for the delivery of coal, on behalf of Tegeta to the Arnot Power Station.
97. In August 2017, an inquiry into State owned Enterprises commenced at Parliament. It was established as part of the DPE's oversight role. It was created with a view to promote transparency and improve governance

⁵ p 185. These facts appear from a report made by the BRP's to the Hawks on 1 July 2016 in terms of the Prevention and Combatting of Corrupt Activities Act 12 of 2004.



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...ster after, he says, he refused to play along

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Former Mining Minister Ngoako Ramathodi has made damn ng new a "egar ons that Eskom chief executive Brian Molefe and chair Ben Ngubane effect vely pressed him to blackmail resources giant Glencore

When he did not comply, he says, President Jacob Zuma fired him within weeks

At the time the Gupta family were angling to buy Optimum, the coal mine that supplies Eskom's Hendrina power station

Glencore, which then owned Optimum, had placed it into business rescue in August after Molefe refused to renegotiate the price of a long-term supply contract and reinstated a disputed R2.17-billion penalty that Optimum supposedly owed for supplying substandard coal

Speaking from Limpopo on Friday, Ramathodi, then minister of mineral resources, said he met with Molefe and Ngubane at the latter's insistence

At the meeting, they allegedly demanded that he suspend all Glencore's mining licences in South Africa, pending the payment of the R2.17-billion penalty

Eskom had tried to issue a legal summons for the penalty on 5 August 2015, but Optimum's business rescue practitioners, appointed only the day before, batted away the claim, citing legislation which restricts new claims once a company is in business rescue.

Glencore maintained the Hendrina contract was losing it R100-million a month and it could no longer support the losses

Business rescue, an alternative to liquidation, puts independent managers in charge in an attempt to save a company

Ramathodi told amaBhungane: "They insisted that I must suspend all the Glencore mining licences pending the payment of the R2-billion. You must remember that the country was undergoing load-shedding at that time. I said to them: how many mines do these people have supplying Eskom? How many more outages are we going to have?"

A suspension of all of Glencore's licenses would have brought Glencore's 14 coal operations to a standstill and risked the jobs of its 35,000 employees in South Africa. At the time Glencore supplied roughly 14% of Eskom's coal needs, including virtually all of the coal for the Hendrina power station.

Ramathodi said Ngubane was very insistent, but he refused: "I said I'm not going to shut the mines."

He said Ngubane then told him that he would have to report on their meeting to President Jacob Zuma straightaway as the president needed to be in the know before leaving on a foreign trip.

On 2 September 2015, Zuma arrived in China for a commemoration of victory over the Nazis in World War II. There he was due to meet Russian President Vladimir Putin.

Ramathodi said he was removed as mines minister shortly after Zuma's return.

Zuma announced unexpectedly on 22 September that year that Mosebenzi Zwane, a Free State politician linked to the Guptas, would replace Ramathodi.

Zuma moved Ramathodi to public service and administration at the time, but fired him along with finance minister Pravin Gordhan and other members of his cabinet earlier this year.

997

Eskom board spokesperson Khulani Qoma has vehemently rejected Ramatlhodi's allegations.

"It makes absolutely no sense that a mere chairman and group chief executive can exert 'pressure' on a sitting minister in an effort to subordinate him to their will. This is a desperate allegation, devoid of logic, and all fair-minded citizens will find it impossible to believe it.

"In the desperation to drive these outlandish allegations, the president's name will always be used

"Did amaBhungane bother to find out why he waited so long before he went public with his allegations or are you interested in the sensational nature of the allegations made?"

HIJACKING

However, Ramatlhodi's allegations add to a growing body of evidence suggesting that the Gupta's R2-billion buyout of Optimum should rank among South Africa's most audacious business hijackings.

AmaBhungane has pieced together the claims of how the family used its network of corporate and political pawns to strong-arm Glencore, the world's toughest commodity trader, into a forced sale – and then syphon off millions in state-owned company contracts to pay the bill.

AmaBhungane has established that Trillian – the financial advisory group owned by the Guptas' inseparable business partner Salim Essa – received almost R300 million from Eskom during 2016 supposedly for consulting and advisory work, including a R30-million payment from Eskom on the day the Gupta consortium was due to pay for the mine. (See part two on Thursday: *Did Lynne Brown lie to parliament?*)

According to former public protector Thuli Madonsela's *State of Capture* report, the Trillian group, which had only been properly established on 1 March 2016, contributed a staggering R235-million towards the Optimum purchase price paid over on 14 April 2016.

Trillian has denied making any contribution towards buying Optimum, but has also refused to comment on the payments received from Eskom, claiming client confidentiality.

The story of the Optimum 'heist' goes to the heart of four interlocking legal battles that have started to peel back the truth of claims of a grand Gupta conspiracy.

It also sets out the case that Molefe, Eskom's peek-a-boo chief executive, must answer.

First, there is Madonsela's *State of Capture* report, whose recommendation of a deeper judicial probe into state capture has been stymied by Zuma.

The president wants a court to review and overturn the public protector's findings.

Madonsela's report led to Molefe's resignation, but its juicy details seemed to disappear beneath the wake of a churning news cycle – until his reinstatement placed the evidence squarely at issue again.

Second, there is a suit and counter-suit between Trillian and rival consulting firm Regiments Capital. Essa, the Gupta associate, poached Regiments rainmaker Eric Wood to become Trillian's chief executive.

Third, there is a bid by Trillian to target a former Trillian executive turned whistleblower. Trillian has laid criminal charges and launched a civil suit against the whistleblower, who had made a set of disclosures to Madonsela's investigators.

In terms of an order by the Commission for Conciliation, Mediation and Arbitration, where she is claiming a constructive dismissal, the whistleblower may not be named.

Finally, there is an investigation by prominent advocate Geoff Budlender, appointed by Trillian chair Tokyo Sexwale, to conduct an internal probe of some of the state capture allegations.

AmaBhungane has woven together strands of information from these cases, combined with other independent sources, to put together a picture of the Guptas' mine grab.

THE SQUEEZE

To understand what happened, we need to go back to 17 April 2015, the day it was announced that Molefe, then chief executive of Transnet, would be seconded to take over at Eskom.

At the time Eskom and Glencore were in the final stages of a deal to reprice the coal supply agreement under which Optimum supplied the Hendrina power station.

Optimum had a long term "fixed-price" contract with Eskom that had become unaffordable.

In 2013 already Optimum had triggered a hardship clause of the contract, claiming that it was losing R165 per ton of coal, which would cost the company R881-million in losses in that year alone.

By the time Molefe arrived in April 2015, Eskom had carried out an audit of the business and agreed to a price increase that would see Optimum supply Hendrina "at cost" until December 2018. All that was left was for the Eskom board to approve the deal.

By this time Eskom had a new board, appointed late the previous year, to which Essa and the Guptas enjoyed an astonishing level of connection. This included their acknowledged friendship with Molefe and the presence of Mark Parnensky, who was also a director of the Guptas' Oakbay Resources and Energy.

The board did not approve the repriced deal. Instead, the matter was referred back to Molefe, the new chief executive. That is when Glencore's headache really began.

On 18 May 2015, Molefe told Optimum that Eskom would not be concluding any deal and would continue enforcing the existing coal supply agreement.

Optimum replied to Molefe four days later, stating that if Eskom persisted in its position, Glencore would be forced to place the mine into business rescue.

But Molefe shut the door. On 10 June he wrote back, unilaterally terminating the settlement process and reinstating the price and coal quality provisions of the

998

Hendrina agreement

Glencore appeared desperate to reach a solution. Global chief executive Ivan Glasenberg travelled to South Africa to meet with Molefe, before tabling a below-cost offer on 30 June 2015 that would see Eskom paying R300 per ton until December 2018.

Eskom was unmoved.

THE APPROACH - AND THE SQUEEZE IS TIGHTENED

The next day, 1 July, Glencore received a letter from auditors KPMG tabling a R2 billion offer for Optimum on behalf of clients wishing to remain anonymous. Later it would emerge that the anonymous clients were the Guptas. Glencore demurred, telling KPMG that Optimum was not for sale.

Two weeks later Eskom's lawyers wrote to Optimum telling it that Eskom was reinstating a R2.17-billion penalty dating back to March 2012, when Optimum's coal allegedly started failing to meet Eskom's required quality. This was the last straw for Glencore, whose board on 31 July decided to place Optimum in business rescue.

But the Gupta axis was also busy.

On 2 August, Molefe and Ajay Gupta spoke on the phone, according to Madonsela's *State of Capture* report. This was the first of 78 telephonic contacts between Molefe and the Gupta brothers or their lieutenants between August 2015 and April 2016 which the public protector enumerated.

Molefe has never provided an explanation for these contacts, which took place when Eskom, Glencore and the Guptas were locked in a furious battle over the future of Optimum.

AmaBhungane invited him to provide his version of events, but he did not respond.

On 3 August 2015, the department of mineral resources suspended Optimum's mining licence, accusing the company of illegally retrenching employees.

The next day Piers Marsden and Peter van der Steen were appointed as joint business rescue practitioners, meaning that Glencore also gave up management control of the company. The move was in the nick of time.

On 5 August Eskom served a legal summons on Optimum demanding R 2 176 530 511 99 – but now the business rescue practitioners wrote back, pointing out that no legal proceedings could be instituted against a company in business rescue without the consent of the practitioners or a court.

Coincidentally that same morning Molefe was in Saxonwold, cellist records accessed by the public protector showed.

AmaBhungane pointed out to Molefe on Friday that a reasonable person might deduce that these were instances where he was in contact with the Gupta family, and invited him to provide an alternative narrative.

He has previously avoided doing so, suggesting he could theoretically have been attending the now fabled "Saxonwold Shebeen". Our invitation to Molefe went unanswered.

Although the game had changed now that Optimum was in business rescue, Eskom still had a powerful bargaining chip – in 2008 Optimum Coal Holdings, through which Glencore owned Optimum, gave Eskom a guarantee that if Optimum went into liquidation before the end of the coal contract in 2018, the holding company would step in and cover the costs.

Even with less than three years left on the contract, the guarantee could have netted the holding company several billion rand, quickly wiping out the other valuable assets in the group.

In short, Optimum's only option was to negotiate with Eskom. But Molefe, it turned out, was not in the mood to negotiate.

On 7 August 2015, four days after his department had caused operations to be suspended at Optimum, Ramathodi may have set the scene for his removal by reinstating Glencore's mining licence for Optimum.

Following that, according to Madonsela's report, there was a flurry of contact between Molefe and the Saxonwold gang.

On 13 August, Molefe and Gupta executive Nazeem Howa communicated on the phone.

On 17, 18 and 23 August Molefe was in Saxonwold. On 24 August Molefe and Howa were in contact four times.

By this time the war of attrition had escalated. Eskom had fallen behind paying Optimum for the Hendrina coal supply and the business rescue practitioners had in turn temporarily suspended coal deliveries to Hendrina.

On 28 August Molefe was in Saxonwold again and a few days later, around September 1, he and Eskom chair Ngubane allegedly met with Ramathodi to try to persuade him to shut down Glencore's other mines. Ramathodi refused. Three weeks later he was gone.

TREASURY COUP & TRILLIAN KNOWLEDGE

In the following months, the Guptas were busy shopping around for a new finance minister, according to Madonsela's report, while they were also facing competition from another bidder for Optimum.

The other bidder secured pole position by offering better terms than the Guptas, but by 23 October 2015, the business rescue practitioners were ready to negotiate with the Gupta consortium again.

According to an amaBhungane source close to the process, the other bidder pulled out after one meeting with Eskom.

On that same day, 23 October, came the alleged stunt that may have unravelled the whole plan.

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Following an approach by Zuma's son Duduzane, then deputy finance minister Mcebisi Jonas made his fateful visit to Saxonwold.

Jonas says he was offered the finance minister position and a bribe. The Guptas deny this.

Jonas maintains he rejected the alleged offer and informed both then finance minister Nhlanhla Nene and his predecessor Pravin Gordhan about the incident.

It is at this point that the Trillian whistleblower's claims find traction, as she records how Wood, who was then still working for Regiments, was allegedly intimately aware of the Guptas' plans.

In her statement to the public protector she alleges: "On 26th October 2015, I was informed by my direct line manager, Eric Wood at Regiments Capital that the president of the Republic of South Africa was going to replace the finance minister Nhlanhla Nene. He subsequently sent me an email outlining national treasury's new initiatives and his proposed fees for each initiative which he had drafted."

Wood had earlier the same morning sent a similar email to Essa, the Guptas' right-hand man, with a note saying, "Hi Salim. As discussed, I have quickly jotted down a few points for the FM."

Four days later, on 30 October 2015, the man Zuma was to appoint as finance minister in December 2015 – Des van Rooyen – made his first appearance at Saxonwold, according to cell mast records obtained by the public protector.

Wood himself confirmed that the reference to "FM" in his email was a reference to the minister of finance, but in his affidavit delivered in the litigation between Trillian and Regiments, he insisted that he was referring to Nene, not Van Rooyen.

Nene, in a response to the *Sunday Times* earlier this year, denied he had discussed any such initiatives with Wood.

KOKO & DMR UP THE ANTE

During November, Eskom's newly appointed group executive for generation, Matshele Koko, appeared to push the business rescue practitioners to do a deal, warning "it may also be an appropriate time for Eskom to review the engagement with Glencore from a portfolio perspective."

He pointed out that they had "an offer on the table" – from the Gupta consortium bidding for Optimum.

On 24 November 2015 Koko chaired a meeting with the business rescue practitioners and Gupta representatives.

Out of the blue Koko announced that Eskom believed that the Optimum coal mine would be financially viable only with the added benefit of Optimum Coal Terminal and Koomfontein coal mine to support it.

The coal export terminal and Koomfontein mine were profitable and were not in business rescue.

They were owned, like the Optimum mine, by Glencore, under the umbrella of Optimum Coal Holdings, but up to that point all negotiations were solely about the ring-fenced, loss-making Optimum mine.

Koko now told the meeting that Eskom would support the sale but only if the deal was done at the Optimum Coal Holdings level, including the two lucrative assets that Glencore was not keen to part with.

Koko insisted that he needed an answer by the weekend.

That weekend, beginning on Saturday, 28 November 2015, inspectors from the department of mineral resources, now under the control of Zwane, allegedly began visiting Glencore's other mines, carrying out inspections for non-compliance.

The department failed to respond to specific questions about this.

That Sunday, 29 November, Zwane boarded a commercial flight to Dubai.

On Monday, 30 November, Koko met the business rescue practitioners and Glencore's local chief executive Clinton Ephron at Eskom's Megawatt Park.

Ephron appeared to call Eskom's bluff.

It is understood that Ephron was sick of being bullied and told Koko that Glencore would take Optimum out of business rescue and fund the losses until the end of the contract in 2018.

The sale was off.

ZWANE, GLENCORE AND THE GUPTAS REACH A DEAL

According to an amaBhungane source familiar with the events, the plan was to tell the consortium of banks holding some R2-billion in Optimum debt that the sale was off and that Glencore would settle the debt itself, but required more time.

The message never made it through.

It is understood Ephron cancelled the meeting after receiving a call telling him to head directly to the airport to fly to Switzerland.

That same day, Zwane also boarded a commercial flight from Dubai to Zurich.

Madonsela recorded in her report: "Minister Zwane did in fact meet with Mr Glasenberg in Switzerland at the Dolder Hotel around 30 November 2015 to 5 December 2015. The other individuals present during said meeting/s was Mr Rajesh (Tony) Gupta as well as Mr Essa."

On 7 December Zwane boarded a commercial flight from Dubai to Johannesburg. It is unclear how he got to Dubai from Zurich, as the *State of Capture* report revealed he did not use the commercial ticket his department had paid for.

Handwritten signature and initials.

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On 8 December van Rooyen was in the vicinity of Saxonwold. On 9 December he was appointed finance minister

On that day, according to the Trillian whistleblower statement, she was informed that opportunities from national treasury and state-owned companies would be channelled Trillian's way

But, instead, there was massive pushback from the markets, business and from within the ANC

On 14 December 2015, Zuma was forced to backtrack and replace van Rooyen with Gordon

Nevertheless, that same day the business rescue practitioners announced that a Gupta company had bought Optimum Coal Holdings for R2.1-billion

The Guptas had got their mine - now they just had to find a way to pay for it (For that story, see part two on Thursday)

Glenore declined to comment for this story

The Gupta family and their corporate representatives have previously made it clear that they will no longer respond to amaBhungane

Eskom board spokesman Qoma said: "All the matters raised by the State of Capture report have not been probed and therefore citing these as though they are legally legitimate, the requirement for a constitutional democracy, is absurd and dangerous. Also important to note that the Public Protector failed to ask for Molefe's version, which is in contravention of the Public Protector's Act."



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Kamatlhodi stands firm on Gupta claims

POLITICS / 17 MAY 2017, 06:11AM / LUYOLO MKENTANE



Ngoako Ramatlhodi File picture: Masi Losi

Johannesburg - Former mineral resources minister Ngoako Ramatlhodi says he's not afraid to repeat his explosive claims in a judicial commission of inquiry that Eskom chief Brian Molefe and chairperson Dr Ben Ngubane interfered in his work.

On Tuesday, Ramatlhodi told Independent Media he was prepared to tell a judicial inquiry that Molefe and Ngubane tried to force him to suspend mining company Glencore's licences at the time the country was going through load shedding.

Ramatlhodi also claimed President Jacob Zuma's son Duduzane was the messenger used by the Gupta family to try to arrange a meeting with him.

The revelation has prompted ANC alliance partners, the SACP and Cosatu, to repeat calls for Zuma to step down.

Ramatlhodi said he held a meeting with Molefe in 2015 where they discussed Glencore's R2 billion penalty for supplying Eskom with substandard coal.

Read Ramatlhodi's explosive claims here

"Brian (Molefe) was not keen to meet Glencore and therefore I was mediating (in) that matter. He was receptive to my ideas," said Ramatlhodi. "However, after my meeting with Brian, the chairman (Ngubane) insisted they wanted another meeting with me. That's when I realised that this was going to be a serious meeting, so I brought in my DG (director-general) and DDGs (deputy directors-general). There are witnesses to the meeting."

Department of Mineral Resources director-general Dr Thibedi Ramontja resigned in December 2015, citing "personal reasons".



At the second meeting, Molefe and Ngubane reportedly insisted Ramatlhodi suspend all Glencore licences pending the payment of the R2bn fine. A suspension of all its licences would have reportedly brought Glencore's 14 coal operations to a standstill and risked the jobs of its 35 000 employees.

Ramatlhodi reportedly said Ngubane insisted that he suspend Glencore's licences, but he refused. "I said I'm not going to shut the mine."

The Eskom board chairperson then reportedly said he would have to report on their meeting to Zuma straightaway as the president needed to be in the know before leaving on a foreign trip.

Zuma went to China on September 2, 2015, and on his return, Ramatlhodi was moved to the Public Service and Administration portfolio. He was replaced by ANC MP Mosebenzi Zwane, who is allegedly linked to the Guptas.

Ramatlhodi said that if asked to repeat his claims in a judicial commission of inquiry, he would.

"I will tell the truth in front of anybody," he said.

Asked if he was being forced to suspend Glencore to make way for Optimum, which at the time the Guptas were said to be planning to buy, he said: "I prefer to put my views to myself on that matter."


Former public protector Thuli Madonsela had recommended a judicial commission be set up to investigate allegations that Molefe favoured the Guptas in the awarding of coal tenders at Eskom.

Zuma's spokesperson Bongani Ngqulunga, Molefe and Ramontja couldn't immediately be reached for comment.

ANC secretary-general Gwede Mantashe said: "Ngoako has spoken, he is a member of the ANC. What do you want me to say?"

Political Bureau

60C

	SUBMISSION DOCUMENT	Unique Identifier	221-222
		Document Type	OCSSTE
		Revision	0
		Review Date	July 2015
		Office of the Company Secretary	

EXECUTIVE SUMMARY

SUBMISSION TO THE BOARD TENDER COMMITTEE (BTC) ON 11 APRIL 2016

1. TITLE OF THE SUBMISSION

Addendum to the Short Term Coal Supply Agreement between various suppliers and Eskom Holdings SOC Limited ("Eskom") for the supply of coal to Arnot Power Station.

2. RESOLUTION REQUIRED

Resolved that Approval be and is hereby granted that:

- 2.1 Addenda to the Short Term Coal Supply Agreements between various suppliers and Eskom be concluded to extend the supply of coal from various sources to Arnot Power Station for up to a further five (5) months and/or such period as may be requested by the supplier but no later than 30 September 2016;
- 2.2 The Chief Financial Officer is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension;
- 2.3 The Group Executive (Generation) is hereby authorised to take all the necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto.

3. SUMMARY OF FACTS


3.1 Salient Facts

The requirement for the supply of contract coal originates from the April 2016 Supply Plan, as presented at the Primary Energy Tactical Control Centre of 8 April 2016. It was identified that supply to Arnot will be inadequate to meet the burn requirements of the power station over the winter months and that there is an urgent need for additional coal. This identified requirement is as a result of the need to build up stock days over a short period while the RFP (request for proposal) for Arnot is being finalised. This shortfall of supply amounts to approximately 2.1 million tonnes.

At present, this RFP is in the negotiation phase and it is anticipated that it will take up to a maximum period of 5 (five) months to conclude the supply contracts.

The current short term portfolio consists of two suppliers, namely Umsimbithi Mining Pty (Ltd) and Tegela Exploration and Resources (Pty) Ltd.

Umsimbithi is contracted to supply Arnot with 540 000 tonnes and is currently underperforming due to protracted industrial action. The current contract supply will then be depleted in and around June 2016, should the industrial action be stemmed and full mining operations resume. The supplier indicated a willingness to extend from July 2016 until September 2016 on similar terms and conditions.

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		Document Type	OCSDTE
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Tegeta's short term contracts are for 600 000 tonnes of coal from Optimum's export stockpile. Supply for these contracts is due to be completed by the 15 April 2016. The coal from Optimum's export stock is a higher grade coal that is suitable for Arnot and Kriel Power Stations and is difficult to source from elsewhere.

These contracts were entered into in terms of the Medium Term Mandate granted by the Board Tender Committee ("BTC") on 11 September 2008. The BTC approved a mandate to negotiate and conclude CSAs on a medium term basis for the supply and delivery of coal to various Eskom Power Stations for the period October 2008 to March 2018 and this included the beneficiation of coal by suppliers or their contractors.

The benefits for extending these Short Term Contracts include:

- The coal is being mined and can be delivered without delay;
- Tegeta has the potential to supply approximately 250kt per month and Umsimbithi approximately 180kt per month. It would therefore be in the best interests of Eskom to negotiate and conclude extensions to these Short Term Contracts to alleviate the coal shortfall at Arnot due to the closure of Arnot colliery. Additionally to alleviate the shortfall coal requirements at Kriel Power Station due to the underperformance of Kriel Underground mine;
- By procuring this coal for Arnot and Kriel Power Stations, it will assist towards building stock days as according to the April 2016 Supply Plan, as presented at the Primary Energy TCC of 8 April 2016 there is currently an estimated 2.14Mt tonnes shortfall at Arnot Power Station for FY2017 and 280 000 tonnes shortfall at Kriel Power Station for FY2017.

Both suppliers have indicated a willingness to extend current contracts, however, Tegeta has requested that Eskom consider some form of prepayment to enable it to meet the production requirements from the export component of the mine in lieu of the fact that it subsidises the direct feed to Hendrina Power and this will enable it to meet the coal supply demands for the two power stations in the short term.


3.2 Key assumptions


The submission and decision required set out herein, is based on the following key assumptions:


- 3.2.1 The quantities as agreed in the existing STC will be delivered;
- 3.2.2 The Terms and Conditions of the existing STC shall remain;
- 3.2.3 Eskom is securing its coal supply for two Power Stations in the short term, pending the conclusion of the procurement process;
- 3.2.4 The principle of prepayment for security of supply has been established by previous approvals.

3.3 Financial implications

- 3.3.1 To date the cost of coal in respect of the these Short Term Contracts is as follows:


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		Document Type	OCSDTE
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Contract 4600059148 Tegeta Exploration and Resources			
		Current Contract	Second Addendum
Tons	tons	500 000	1 250 000
Rands	'000	235, 715	586,787
Unit Cost	R/GJ	20.41	20.41

* The first addendum catered for payment terms only

Contract 4600059317 Umsimbithi Mining (Pty) Ltd			
		Current Contract	First Addendum
Tons	tons	540 000	540 000
Rands	'000	219,880	219,880
Unit Cost	R/GJ	18.50	18.50




3.3.2 Given the costs to date and the contract price, the Tegeta prepayment for the next 5 months is estimated at approximately R 586,787 500.


3.4 Human Resource implications

None

3.5 Risks (Including Environment, Legal or Contractual risks)

RISK	MITIGATING FACTORS	LEVEL (HIGH/MEDIUM/LOW)
Cost:	The prices will remain fixed for the duration of this short term contract.	Low
Scope:	The only change in the scope may be that the coal may be swung from Arnot or Kriel Power Station to another Power Station, the price of the coal will remain unchanged, and the only change will be in the transport costs.	Medium
People:	No Risk	N/A
Suppliers:	The supplier will remain unchanged for this short term contract.	N/A
Time:	This is a five month extension to short term contract only, it is not anticipated that there is any risk to time.	Low
Safety:	PED Health and Safety have confirmed that the supplier meets the legislative requirements.	Low
Environment:	PED Environmental Department have confirmed that the supplier meets the legislative requirements.	Low

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		Review Date	July 2015
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RISK	MITIGATING FACTORS	LEVEL (HIGH/MEDIUM/LOW)
Quality:	The coal is suitable for Arnot and Kriel Power Stations as per the Combustion Report received from Research, Testing and Development Department.	Low
Other:	N/A	N/A

3.6 Verification by independent party (if applicable)

Not Applicable

4. OTHER APPROVALS REQUIRED

None

SIGNED



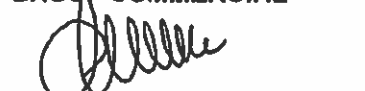
AYANDA NTETA
ACTING GENERAL MANAGER (FUEL SOURCING)
PRIMARY ENERGY

11 April 2016
DATE



EDWIN MABELANE
ACTING CHIEF PROCUREMENT OFFICER
GROUP COMMERCIAL

2016/04/11
DATE



MATSHELE KOKO
GROUP EXECUTIVE
GENERATION

11/04/16
DATE

Who hereby represents that the above information is correct.





Media Room Assertions that prepayment made to Tegeta is a loan pure nonsensical

Assertions that prepayment made to Tegeta is a loan pure nonsensical

Saturday, 22 April 2017: Eskom finds the assertions that the prepayment made to Tegeta "was a loan" pure nonsense; it is based on no facts but fiction.

The Tegeta prepayment request was considered on its merits, which were the then security of supply risk during the height of load shedding. Eskom received value for money in that coal was delivered as agreed in terms of the agreement.

Conditions relating to the prepayment included a 3.5% prepayment discount on the coal price and sufficient security guarantees, which included the pledging of Tegeta shares.

Internal Audit has also confirmed that the full amount of the prepayment to Tegeta has been recovered via coal delivered to Eskom by the end August 2016. During this period of time Eskom had sufficient security in place to cover any potential default by Tegeta.

Given the fact that the prepayment was recovered, it remains a grave concern that perceptions continue that a supposed "liability" still exists.

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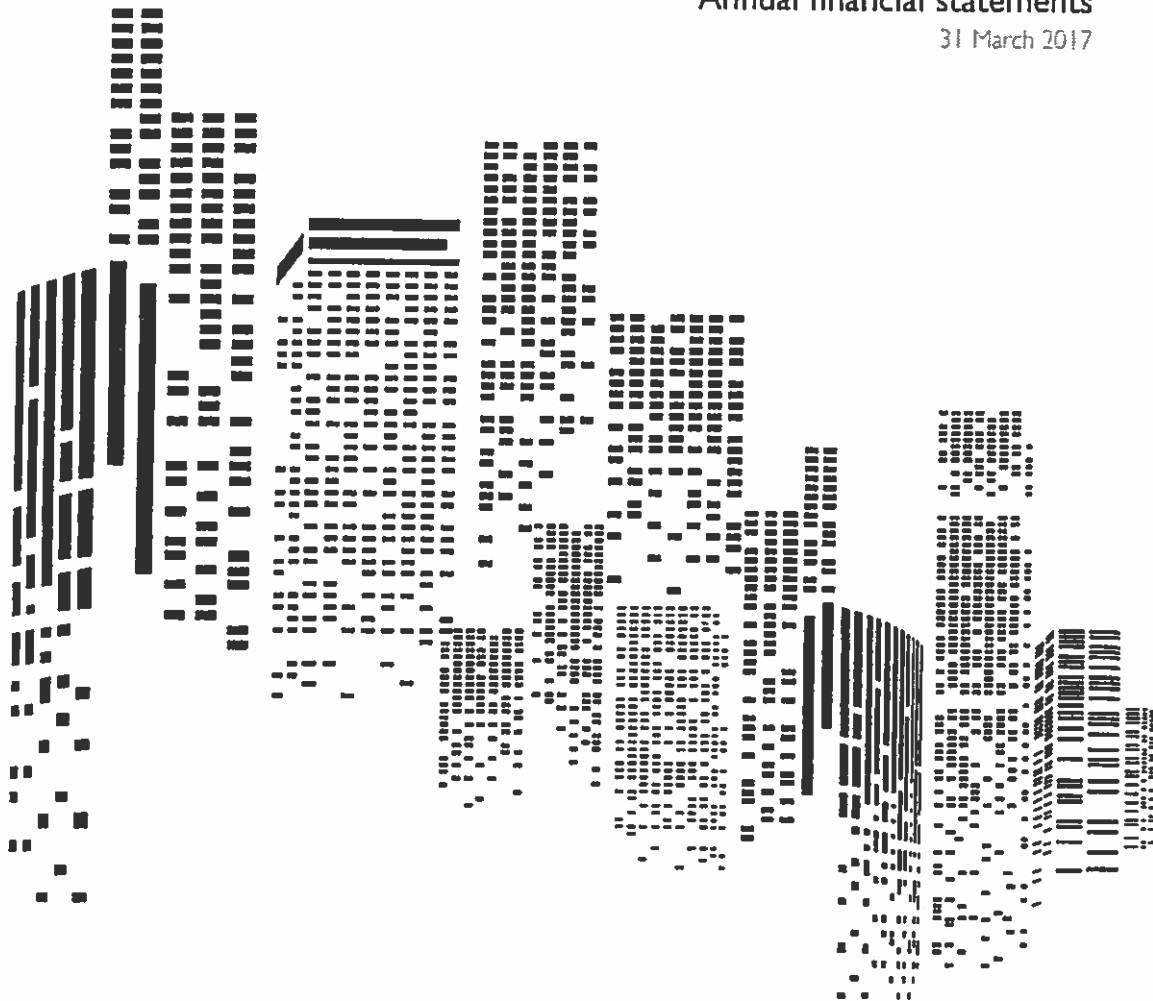
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Annual financial statements

31 March 2017



Enabling economic growth

A handwritten signature in black ink, located in the bottom right corner of the page.

Handwritten initials or a mark in black ink, located below the signature in the bottom right corner.

Contents

Statement of directors' responsibilities and approval	2	23. Service concession arrangements	86
Report of the audit and risk committee	3	24. Share capital	96
Statement by company secretary	4	25. Debt securities and borrowings	87
Directors' report	5	26. Embedded derivatives	89
Independent auditors' report to Parliament and the shareholder – Minister of Public Enterprises	22	27. Payments received in advance and deferred income	89
Statements of financial position	28	28. Employee benefit obligations	90
Income statements	29	29. Provisions	92
Statements of comprehensive income	29	30. Finance lease payables	93
Statements of changes in equity	30	31. Trade and other payables	94
Statements of cash flows	31	32. Revenue	94
Notes to the financial statements:		33. Other income	94
Note		34. Primary energy	94
1. General information	33	35. Employee benefit expense	95
2. Summary of significant accounting policies	33	36. Net impairment loss	95
3. Capital management and going concern	42	37. Other expenses	95
4. Critical accounting estimates and assumptions	43	38. Depreciation and amortisation expense	95
5. Financial risk management	47	39. Net fair value loss on financial instruments, excluding embedded derivatives	96
6. Accounting classification and fair value	62	40. Finance income	96
7. Segment information	69	41. Finance cost	96
8. Property, plant and equipment	72	42. Income tax	97
9. Intangible assets	74	43. Cash generated from operations	98
10. Future fuel supplies	74	44. Net debt reconciliation	99
11. Investment in equity-accounted investees	74	45. Guarantees and contingent liabilities	100
12. Investment in subsidiaries	75	46. Commitments	101
13. Deferred tax	76	47. Related-party transactions and balances	102
14. Investment in securities and financial trading instruments	77	48. Events after the reporting date	104
15. Loans receivable	78	49. Restatement of comparatives	105
16. Derivatives held for risk management	79	50. Directors' remuneration	106
17. Finance lease receivables	82	51. New standards and interpretations	110
18. Payments made in advance	83	52. Information required by the Public Finance Management Act	113
19. Trade and other receivables	83	53. Pro forma revaluation of property, plant and equipment (unaudited)	117
20. Inventories	84	Appendix – Abbreviations, acronyms and definitions	118
21. Cash and cash equivalents	85		
22. Non-current assets and liabilities held-for-sale	85		

The annual financial statements have been prepared under the supervision of the chief financial officer, A Singh CA(SA). The financial statements have been audited in compliance with section 30 of the Companies Act and approved by the board of directors on 15 June 2017. The audited financial statements of the group and Eskom as at and for the year ended 31 March 2017 are available for inspection at the company's registered office and on the Eskom website at www.eskom.co.za and were published on 11 July 2017.

Handwritten signature and initials.

Statement of directors' responsibilities and approval

The board of directors (board) is responsible for the maintenance of adequate accounting records and appropriate systems of internal control as well as the preparation, integrity and fair presentation of the annual consolidated financial statements which include financial results, performance against predetermined objectives and the financial position at the end of the year of Eskom Holdings SOC Ltd (Eskom), its subsidiaries, joint ventures, associates and structured entities (together, the group). The annual financial statements have been prepared in accordance with International Financial Reporting Standards (IFRS), the Public Finance Management Act (PFMA), and the South African Companies Act (Companies Act).

In preparing the annual financial statements, the directors are required to consistently apply appropriate accounting policies, make reasonable and prudent judgements and estimates, state whether applicable accounting standards have been followed and whether the annual financial statements for Eskom and the group will continue to be prepared on the going-concern basis in the foreseeable future.

To enable the Eskom board of directors to meet the abovementioned responsibilities, the board sets standards and management implements systems of internal control. The controls are designed to provide assurance that assets are safeguarded, and that liabilities and working capital are efficiently managed. Policies, procedures, structures and approval frameworks provide direction, accountability and division of responsibilities, and contain self-monitoring mechanisms. The controls throughout Eskom and the group focus on those critical risk areas identified by operational management and confirmed by executive management. Both management and the internal audit department closely monitor the controls, and actions are taken to correct deficiencies as they are identified.

Eskom's audit and risk committee plays an integral role in risk management as well as in overseeing Eskom's internal audit function (audit and forensic). The group's internal audit function, which operates unimpeded and independently from operational management, and has unrestricted access to the group's audit and risk committee, assesses and, when necessary, recommends improvements to the system of internal control and accounting policies, based on audit plans and outcomes that take cognisance of the relative degrees of risk of each function or aspect of the business.

Eskom's audit and risk committee has reviewed the going-concern basis and the effectiveness of Eskom and the group's internal controls. The committee has evaluated Eskom and the group's annual financial statements and has recommended their approval to the board. The audit and risk committee's approval is set out on page 3.

Based on the information and explanations given by management, the internal audit function and discussions held with the independent external auditors, the directors are of the opinion that the internal accounting controls of Eskom and the group are adequate to ensure that the financial records may be relied upon for preparing the annual financial statements, and that accountability for assets and liabilities is maintained.

The directors have made an assessment of the ability of Eskom and the group to continue as a going concern in the foreseeable future. The directors reviewed Eskom's and the group's performance for the year ended 31 March 2017 and the cash flow forecast for the 15 months ending 30 June 2018.

The board is pursuing funding options to implement the group's borrowing programme. In assessing the ability to raise funds, the current economic climate as well as Eskom's and the sovereign's credit ratings have been taken into account.

Based on the above, the directors are satisfied that Eskom and the group have access to adequate resources and facilities to be able to continue its operations for the foreseeable future. Accordingly the board has continued to adopt the going-concern basis in preparing the financial statements.

These annual financial statements are based on appropriate accounting policies, supported by reasonable and prudent judgements and estimates and are prepared on the going-concern basis.

In the opinion of the directors, based on the information available to date, the annual financial statements fairly present the financial position of Eskom and the group at 31 March 2017 and the results of its operations and cash flow information for the year then ended.

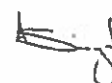
The independent external auditors are responsible for independently auditing the financial statements in accordance with International Standards of Auditing (ISA) and the Public Audit Act (PAA). The independent external auditors audited the Eskom and group annual financial statements in accordance with ISA and the PAA and their qualified audit report is presented on page 22. The independent external auditors were given unrestricted access to all financial records and related data, including minutes of all meetings of the board of directors and committees of the board. The directors believe that all representations made to the independent external auditors during their audit are valid and appropriate.

The Eskom and group annual financial statements for the year ended 31 March 2017 have been prepared under the supervision of the chief financial officer A Singh CA(SA), and approved by the board of directors and signed on its behalf by:



Z Khoza
Interim chairman

15 June 2017



A Singh
Chief financial officer

15 June 2017

Report of the audit and risk committee

Mandate and terms of reference

The audit and risk committee (the committee) presents its report in terms of the requirements of the PFMA, the Companies Act (section 94(7)(f)) and in accordance with the King Code of Governance Principles for South Africa for the financial year ended 31 March 2017.

The role of the committee is defined in its mandate. It covers, among others, its statutory duties and the assistance to the board with the oversight of financial and non-financial reporting and disclosure, internal control system, risk management, internal and external audit functions and combined assurance, including information technology governance. Information on the membership and composition of the committee is set out in the 2017 integrated report and related information on the Eskom website.

The committee fulfilled all its statutory duties as required by section 94(7)(f) of the Companies Act. The committee reports that it has adopted an appropriate formal terms of reference as its audit and risk committee charter, has regulated its affairs in compliance with this charter and has discharged all its responsibilities contained therein.

Eskom is applying a combined assurance model to ensure coordinated assurance activities. The committee oversees the assurance activities and the establishment of effective systems of internal control to provide reasonable assurance that Eskom's financial and non-financial objectives are achieved and that the preparation of financial statements for external purposes is in accordance with IFRS.

Execution of functions

In the conduct of its duties the committee has, *inter alia*, reviewed the following areas:

Going concern assumption

The committee considered the following:

- robustness of budgets and business results
- cash flow projections for the 15 months ending 30 June 2018
- regulatory clearing account (RCA) applications for Multi-Year Price Determination (MYPD) 3
- cost saving opportunities to reduce the revenue shortfall
- the cost of the capital projects, including the capacity expansion programme
- funding plan to finance the capacity expansion programme
- going concern as the basis of preparation of the annual financial statements

Oversight of financial and non-financial reporting and disclosure

The committee considered the following:

- annual financial statements for fair presentation with the relevant requirements of the PFMA, Companies Act and IFRS. The committee considered in particular the following matters:
 - the restatement in the financial statements as a result of assets transferred from third parties that were not recognised in the correct accounting period
 - valuation of property, plant and equipment and that no impairment exists
 - valuation and adequacy of long-term provisions
 - the irregular and fruitless and wasteful expenditure reported in terms of the PFMA and the impact thereof on the audit opinion.

Internal control, management of risks and compliance with legal and regulatory requirements

The committee considered the following:

- effectiveness of internal control systems and governance processes
- legal matters that could have a material impact on the group
- effectiveness of the system and process of risk management including the following specific risks:
 - financial reporting
 - internal financial controls
 - fraud risks relating to financial reporting
 - information technology risks relating to financial reporting and internal control
 - the effectiveness of the entity's compliance with legal and regulatory requirements

Internal and external audit

The committee considered the following:

- charter, annual audit plan, independence, effectiveness, coordination with external auditors and performance of the assurance and forensic department
- appointment of the external auditors in terms of the Companies Act and other applicable requirements
- the quality of the external audit as well as the independence and objectivity of the external auditors including the tenure of the audit firm and the rotation of the engagement partner
- external audit plan, audit budget, actual fee and terms of engagement of the external auditors including adherence to the policy of not allowing the external auditors to provide any non-audit services
- accounting, sustainability and auditing concerns identified as a result of the internal and external audits, including reportable irregularities

Report of the audit and risk committee (continued)

Opinion

The committee is of the opinion, based on the information and explanations provided by management and the assurance and forensic department during the year and at year end and discussions with the independent external auditors, that:

- the expertise, resources and experience of the finance function under the leadership of the chief financial officer are adequate
- the system and process of risk management and compliance processes are adequate
- the internal accounting controls are adequate to ensure that the financial records may be relied upon for preparing the financial statements and accountability for assets and liabilities is maintained
- the internal audit charter approved by the committee was adhered to
- the expertise, resources and experience of the assurance and forensic department are adequate
- the assurance and forensic department under the leadership of the senior general manager assurance and forensic are operated effectively
- the combined assurance model is operating effectively
- the information contained in the integrated report and related information on the Eskom website is reliable and does not contradict the information in the annual financial statements
- Eskom and the group have access to adequate resources and facilities to be able to continue their operations for the foreseeable future, supporting the going-concern assumption
- it is satisfied with the audit quality of the external audit as well as the independence and objectivity of the external auditors having considered the matters set out in section 94(B) of the Companies Act

The committee is satisfied, notwithstanding the aspects considered in relation to the annual financial statements, that nothing significant has come to the attention of the committee to indicate any material breakdown in the functioning of the controls, procedures and systems during the year under review and that the controls are still appropriate to ensure compliance with the requirements of the Companies Act, the PFMA and IFRS.

Recommendation of the annual financial statements

The committee has evaluated the financial statements of Eskom and the group for the year ended 31 March 2017 and based on the information provided to it, considers that they comply, in all material respects, with the requirements of the Companies Act, the PFMA and IFRS. The committee concurs that the adoption of the going-concern premise in the preparation of the financial statements is appropriate.

The committee has therefore, at their meeting held on 15 June 2017, recommended the adoption of the financial statements by the board.



C Mabude
Chairman (acting)

15 June 2017

Statement by company secretary

In terms of section 88(2)(e) of the Companies Act of South Africa, I certify that the company has filed with the Companies and Intellectual Property Commission all such returns and notices in terms of this Act, and all such returns appear to be true, correct and up to date.



SM Daniels
Company secretary

15 June 2017



52. Information required by the Public Finance Management Act

Any losses due to criminal conduct or irregular or fruitless and wasteful expenditure that individually (or collectively where items are closely related) exceed R25 million must be reported in terms of the significance and materiality framework agreed with the shareholder.

52.1 Irregular expenditure

	Note	Group and company	
		2017 Rm	2016 Rm
Balance at beginning of the year		348	418
Current year expenditure		4 043	106
Amounts condoned		(1 084)	(146)
Amounts not recoverable (not condoned)		(311)	(30)
Balance at end of the year		2 996	348
Age analysis		2 996	348
Current year		2 992	38
Prior years		4	310
Comprising			
B2B engineering tools expenditure incurred without PFMA approval	(a)	—	310
Balance at beginning of the year		310	310
Amounts not recoverable (not condoned)		(310)	—
Purchase of land without investment committee approval	(b)	—	—
Balance at beginning of the year		—	108
Amounts condoned		—	(108)
Breach of PPPFA: monetary thresholds – incorrect tender process applied	(c)	92	11
Balance at beginning of the year		11	—
Current year expenditure		95	4
Amounts condoned		(13)	—
Amounts not recoverable (not condoned)		(1)	(30)
Breach of the NEMA	(d)	—	7
Balance at beginning of the year		7	—
Current year expenditure		—	7
Amounts condoned		(7)	—
Use of labour broker – internal processes not followed	(e)	—	10
Balance at beginning of the year		10	—
Current year expenditure		—	10
Amounts condoned		(10)	—
Professional services contract – internal processes not followed		—	—
Current year expenditure		—	36
Amounts condoned		—	(36)
Tender processes not adhered to – commitments made before approval	(f)	56	1
Balance at beginning of the year		1	—
Current year expenditure		549	3
Amounts condoned		(494)	(2)
Procurement of services – incorrect classification as an emergency	(g)	8	4
Balance at beginning of the year		4	—
Current year expenditure		4	4
Quality management – tender process not followed and insufficient delegation of authority	(h)	1 560	—
Current year expenditure		987	—
Breach of PPPFA – tax clearance certificates	(i)	1 453	—
Current year expenditure		(466)	—
Amounts condoned		—	—
Non-compliance with CIDB regulations	(j)	8	—
Current year expenditure		97	—
Amounts condoned		(89)	—
Breach of PFMA – use of sole source	(k)	96	—
Current year expenditure		—	—
Breach of PFMA – tender processes not adhered to	(l)	189	—
Current year expenditure		—	—
Various other instances		—	5
Balance at beginning of the year		5	—
Current year expenditure		—	5
Amounts condoned		(5)	—

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Notes to the financial statements (continued)
for the year ended 31 March 2017

52. Information required by the Public Finance Management Act (continued)

52.1 Irregular expenditure (continued)

- (a) **B2B engineering tools expenditure incurred without PFMA approval**
The matter regarding the expenditure incurred on the B2B Engineering Tools project of R310 million before PFMA approval was reported in 2015. The expenditure was subsequently derecognised by the board in accordance with the National Treasury Guideline issued on 19 April 2016.
- (b) **Purchase of land without investment committee approval**
The matter regarding the purchase of land without investment committee approval was reported in 2015. The irregular expenditure incurred has been condoned by the relevant authority and has therefore been removed from the register of irregular expenditure.
- (c) **Breach of PPPFA: monetary thresholds – incorrect tender process applied**
Irregular expenditure of R95 million was incurred in breach of the Preferential Procurement Policy Framework Act (PPPFA) as follows:
- the PPPFA requires that monetary thresholds to determine the appropriate point-scoring criteria applicable to specific transactions be considered inclusive of VAT. Eskom erroneously applied the thresholds exclusive of VAT. Certain procurement was therefore done using the incorrect point-scoring criteria and resulted in a breach of PPPFA. Irregular expenditure incurred on affected transactions amounted to R95 million (2016: R11 million) of which R13 million was condoned in 2017, including R11 million reported in 2016. An amount of R92 million was awaiting condonation at 31 March 2017. Eskom is ensuring that regular reviews are conducted and that buyers are made aware and retrained on the supply chain management procedure
 - Eskom's exemption from the PPPFA expired on 7 December 2012. Eskom paid R0.4 million (2016: R30 million) during the year on contracts that were entered into between 8 December 2012 and 31 March 2013 that were inconsistent with the requirements of the PPPFA. These contracts were not recalled or corrected at the time and Eskom continued to meet its obligations in terms of these contracts. All the affected transactions took place in the normal course of business and were subject to Eskom's approved procurement policy in force at the time
- (d) **Breach of NEMA**
Eskom unlawfully commenced with construction activities for a 132 kV power line in the Eastern Cape Province along a route that was not authorised by the Department of Environmental Affairs (DEA). An amount of R7 million was incurred on the portion of the line constructed in contravention of the National Environmental Management Act (NEMA). Eskom rectified the breach and received the required authorisation from DEA on 2 September 2016. Eskom paid a penalty of R1 million imposed by DEA. Disciplinary action was concluded against three employees involved.
- (e) **Use of labour broker – internal processes not followed**
Eskom processes were not followed for the procurement of certain goods and services through a labour broker. The senior managers concerned were disciplined and the labour broker instructed to discontinue sundry payments. The expenditure was condoned and no further action is required.
- (f) **Tender processes not adhered to – commitments made before approval**
Irregular expenditure of R549 million comprising 245 incidents was incurred as a result of non-adherence to internal procurement processes and employees contravening the Eskom Delegation of Authority. Incidents totalling R56 million are awaiting condonation.
- (g) **Procurement of services – incorrect classification as an emergency**
Services procured to the value of R4 million (2016: R4 million) were incorrectly classified as an emergency in the procurement process. This matter will be submitted for condonation in 2018.
- (h) **Quality management – tender process not followed and insufficient delegation of authority**
Irregular expenditure estimated at R1 560 million was incurred because of the placement of contracts without proper delegation of authority or without following established processes during the 2008-2015 financial years.
- Multi-disciplinary investigations were conducted into indications of mismanagement and allegations of irregularities in the quality management department. Possible fruitless and wasteful expenditure of R886 million regarding this matter was reported in 2016.
- A further investigation was recently finalised by an independent external company with the following outcome:
- identification of irregular expenditure of R1 560 million because of the placement of contracts without proper delegation of authority or without following established processes during the 2008-2015 financial years with the bulk of the payments made on these contracts occurring in the 2013 and 2014 financial years
 - estimated fruitless and wasteful expenditure of R510 million compared to the original estimate of R886 million reported in 2016. Refer to 52.2(a)
 - losses due to criminal conduct of R2 million. Refer to 52.3(b)
- Actions taken to date include the following:
- two employees have been dismissed (one is a senior manager)
 - a criminal case was opened with the South African Police Service to investigate possible fraudulent transactions
 - civil action against Eskom by one of the main suppliers is being defended
 - a fidelity claim has been lodged in terms of a commercial crime insurance policy with a cover limit of R3 billion for losses arising from fraudulent or dishonest acts committed by employees. This claim will be concluded once the legal matters have been finalised

Further disciplinary, civil and/or criminal action as appropriate will be considered against other parties involved, including action to recover losses.

The following contract management process improvements have been implemented:

- improvement in the monitoring of performance by the SHEQ panel service providers with regular inspections and enforcement of consequence management for poor or ineffective delivery
- effective segregation of duties
- reconciliation of task orders to scope, budget, timesheets, invoices and payments, with approval of timesheets by project managers on site
- limiting of long-term task orders and close monitoring of performance to ensure resources are not idle nor unproductive
- training of employees on effective electronic documentation management

(i) **Breach of PPPFA – tax clearance certificates**

PPPFA regulations require that tenders may only be awarded to a person whose tax matters have been declared to be in order by SARS. SARS only issues such a confirmation to a person registered as a taxpayer. Three contracts with an award value of R340 million were reported as being under investigation in 2016. A further R126 million was incurred on these contracts during the year. They were confirmed as irregular in 2017 since no SARS declaration was found to be obtained at the time of award and were condoned during the year. There were 59 contracts that were similarly affected during 2017. Irregular expenditure of R987 million was incurred on these contracts during the year and is awaiting condonation.

(j) **Non-compliance with CIDB regulations**

Construction Industry Development Board (CIDB) regulations specify the different levels of grading that contractors must have based on the value of the contracts to be awarded (not a requirement for World Bank-funded contracts). Expenditure of R89 million was identified and condoned during the year on two foreign contracts awarded in terms of World Bank funding where the grading level was not in line with CIDB regulations. A further R8 million was incurred on a contract for which tender invitations were not advertised on the CIDB website as per the CIDB Regulation 24.

(k) **Breach of PFMA – use of sole source**

There were three incidents of irregular expenditure totalling R96 million where the use of sole sources could not be adequately justified.

(l) **Breach of PFMA – tender processes not adhered to**

There were 11 incidents of irregular expenditure totalling R189 million where approved supply chain management processes were not adhered to.

(m) **Irregular expenditure under investigation**

There are numerous additional instances of procurement that are subject to investigation, namely:

- tender processes not adhered to including breaches of delegation of authority
- incorrect PPPFA points thresholds applied
- non-compliance with CIDB regulations
- lack of supporting documentation including tax clearance certificates
- award made to a company on a sole source basis which might not comply with the criteria of sole source and contract amount determined on a contingency fee basis
- non-declaration of conflicts of interest by employees and tenderers giving rise to a risk of undue influence
- contract information not reflected correctly in the reporting system

These matters are being investigated and will be disclosed in a subsequent period should they prove to be irregular.

(n) **Relevant authority for condonations**

Condonations are currently approved by the relevant internal governance committee unless it is specifically required to be approved by National Treasury. Eskom is awaiting clarification from National Treasury on whether a relevant government department responsible for a particular piece of legislation must approve condonation of a breach relating to that legislation.

52.2 **Fruitless and wasteful expenditure**

(a) **Incidents of fruitless and wasteful expenditure above the materiality threshold**

There was one (2016: one) major incident of fruitless and wasteful expenditure incurred by the group during the year that exceeded the materiality threshold of R25 million. This matter is carried forward from 2016.

Fruitless and wasteful expenditure incurred by the quality management department

An investigation by an independent external party confirmed fruitless and wasteful expenditure estimated at R510 million compared to the original estimate of R886 million reported in the previous financial year. Refer to 52.1(h).

(b) **Incidents of fruitless and wasteful expenditure below the materiality threshold**

Total fruitless and wasteful expenditure which individually or collectively (where items are closely related) were below the materiality threshold was R37 million (2016: R93 million) comprising 210 (2016: 655) incidents of which 10 incidents accounted for R22 million. Management continues to institute preventive and corrective measures, including disciplinary action, as considered appropriate.

(c) **Fruitless and wasteful expenditure under investigation**

There are currently 84 incidents of alleged fruitless and wasteful expenditure under investigation, of which none is expected to exceed the materiality threshold of R25 million. The nature and extent of potential losses incurred cannot be reasonably ascertained at this stage. It is important to note that these are allegations and many of these occurrences may not qualify as fruitless and wasteful expenditure upon conclusion of the investigations.

Notes to the financial statements (continued)
for the year ended 31 March 2017

52. Information required by the Public Finance Management Act (continued)

52.3 Criminal conduct

(a) Theft of conductors, cabling and related equipment

Losses due to conductor theft, cabling and related equipment totalled R70 million (2016: R85 million), involving 5 734 incidents (2016: 5 161 incidents). Actions to combat these losses are managed by the Eskom Network Equipment Crime Committee in collaboration with other affected state-owned companies and the South African Police Services. The combined effort resulted in 235 (2016: 229) arrests and R5 million (2016: R5 million) worth of stolen material was recovered.

(b) Fraud

Eskom concluded 15 (2016: 14) investigations into fraud during the reporting period involving R24 million (2016: R33 million), including a R2 million loss due to criminal conduct on the quality management matter. Refer to note 52.1(h). The existing internal control measures in the affected areas as well as similar areas have been reviewed and enhanced. Disciplinary, criminal as well as civil proceedings have been instituted against those involved.

(c) Non-technical revenue losses

Non-technical losses are estimated at R1.3 billion (2016: R1.2 billion). These arise mainly from meter tampering and bypasses, illegal connections to the electricity network and illegal vending of electricity.

Interventions to reduce non-technical energy losses:

- implementation of technologies in the form of smart/split meters with protective enclosures to prevent access to the meter
- disconnection of illegal connections, meter tamperers and imposition of penalties (tamper fines)
- estimation and recovery of revenue for historic unaccounted energy where tampered metering installations are encountered
- revision of supply group codes on prepaid meters to prevent the use of illegal prepaid vouchers
- investigations and prosecution of criminals perpetrating electricity theft through the sale of illegal prepaid vouchers, illegal electrification and meter tampering services
- customer education, social mobilisation and partnership campaigns to drive behaviour change

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Mr Patrick Dlamini
Chief Executive Officer
Development Bank of Southern Africa
1258 Lever Road Headway Hill
Midrand

Dear Mr Dlamini

RE: REQUEST TO AMEND THE TERM LOAN FACILITY AGREEMENT WITH RESPECT OF AN EVENT OF DEFAULT PROVISION

Following the trigger, and its consequences of Clause 16.1.4 of the Term Loan Facility Agreement enter into between the Development Bank of Southern Africa ("DBSA/ the Bank") and Eskom Holdings SOC Ltd ("Eskom") on the 4th November 2010, Eskom is requesting the Bank to grant permission for an amendment to the provision to limit the event of default only to an instance where the Company's auditor refuses to certify the Annual Financial Statements of Eskom.

The company's financial statements for the year ended 31 March 2017 which were prepared in compliance with (IFRS) and Public Finance and Management Act (PFMA), given that Eskom is a State Own Enterprise (SOE), have been audited as required by the Companies Act and Auditor General for compliance with the above mentioned standards and legislation. The audit has been conducted in accordance with the revised International Audit Standards (IAS), the result of which is a qualified audit opinion with respect to issues relating only to the PFMA.

The modified audit opinion arises as a result of the auditor being unable to conclude that the irregular expenditure as disclosed in Note 52 of the financial statements includes all the irregular expenditure that was incurred by the entity in the financial year under question. The irregular expenditure amounts to R2,9 billion and comprises of expenditures that were incurred without PFMA approval, following incorrect tender process, incurring spending without an investment approval, breach of (PPPFA) monetary thresholds and lack of tax clearance certificates, breach of environmental regulations, use of labour brokers, use sole source processed incorrectly and incorrect classification of contracts as emergency. Some of these were cured in various ways, mostly through condonations.

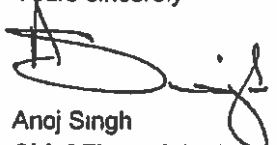
The audit qualification on the existing loan agreement with the Bank and the French Development Agency (AFD) gives rise to event of default. The Bank's provision in this regard further provides for the auditors note on reportable irregularity with respect to the financial statements of the Borrower to trigger an event of default. The occurrence of an event of default will trigger cross default on other loan agreements and this could result in acceleration of Eskom's entire debt of circa R340 billion.

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Eskom Holdings SOC Ltd Reg No 2002/015527/30

It is inconceivable that the Bank's intention was to include a qualification of this nature to trigger default and consequently cross default. In the light of this engagements have been held with AFD and the agency has agreed to amend their loan agreement to confine the provision only to situations where the auditor refuses to certify the Borrower's Annual Financial Statements. For the sustainability of the company and its planned funding initiatives it is important for an event of default, that could result in cross default on other loans, not to be triggered. It is for this reason that Eskom is requesting the Bank to permit amendment of Clause 16.1.14 to provide for auditors qualification only with respect to the auditor refusing to certify financial statements of the Borrower. The audit opinion was issued on the 23rd June 2017 and to and to avert triggering an event of default, if the amendment is agreeable to the Bank, Eskom further requests that the amendment be made to be deemed effective prior to that date. Eskom appreciates the processes that might have to be followed to achieve this request and in the unlikely event of the amendment not being issued before the date planned for publishing the results a letter, issued on or before the 11th July 2017, with the intention to amend the provision will be greatly appreciated.

We trust that this request will receive the Bank's favourable consideration.

Yours sincerely


Anoj Singh
Chief Financial Officer
Date: 07/07/17.



Development Bank
of Southern Africa

14 July 2017

Mr. J. Dladla
Acting Chief Executive Officer
Eskom Holding SOC Limited

Via email: DladlaJA@eskom.co.za

URGENT

Dear Mr. Dladla,

Development Bank of Southern Africa Limited (DBSA) / Eskom Holdings Limited (Eskom) - Term Loan Facility Agreement

- 1 We refer to the without prejudice meeting held between DBSA and Eskom, and our respective legal counsel on 12 July 2017.
- 2 The purpose of the meeting was to:
 - 2.1 discuss the consequences of the event of default that occurred pursuant to the qualification of Eskom's audited financial statements on 23 June 2017 (event of default), under the Term Loan Facility Agreement (Agreement) concluded between the DBSA and Eskom on 4 November 2010 and under Eskom's various other financing instruments; and
 - 2.2 Address and resolve Eskom's request as recorded in their letter to the DBSA dated 7 July 2017 retrospectively to amend the Agreement to delete clause 16.1.14, which amendment Eskom asked the DBSA to be "deemed effective" prior to 23 June 2017.

P.J. Mokoena (Chairman), H.M. Dlamini (Deputy Chairman),
R.K. Dlamini (Chief Executive), L. Pheteni-Baloyi, B. Mabaso,
D. Mokoena, A. Mokoena, G. Mokoena, K. Nkomo, A. Sengiso,
M. Sengiso, M. van Rensburg, M. Nkomo
Executive
Barokole Sowazi (Company Secretary)

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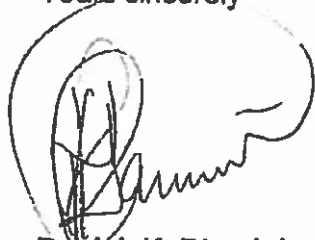
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 Tel: +27-11-813-3056 P.O. Box 120411 Jeffway House, Midrand
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- 6.4 Eskom providing proof to the DBSA that Eskom adequately consulted with the Department of Public Enterprises and National Treasury on this matter; and
 - 6.5 Eskom providing DBSA with a detailed plan of mitigating measures Eskom proposes putting in place and remedial action Eskom proposes taking to address the events that led to the event of default and to ensure that Eskom's audited financial statements will not again be qualified;
 - 6.6 The DBSA's board approval of this letter and this proposal; and
 - 6.7 Acceptance of this proposal by the board of Eskom;
- 7 All our rights are and continue to remain reserved.

Yours sincerely

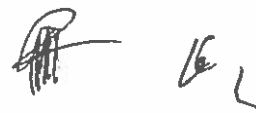


Patrick K. Dlamini
Chief Executive and Managing Director

cc. Mr. A. Singh (CFO)
 Ms S Daniels (Company Secretary)

P.K. Dlamini (Chief Executive), M. Baleni (Deputy Chairman),
 P.K. Dlamini (Chief Executive), P. Bhengu, B. Bakshi, B. Makhulu,
 D. Maphahle, A. Moko, C. Molewa, K. Ndoo, A. Singh,
 M. Sibiya, M. V. Rensburg, M. T. Ngqaleni
 Executive
 Enkhobele Sengiso (Company Secretary)

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Development Bank
of Southern Africa

19 July 2017

Mr. Z Khoza
Interim Chairman of the Board of Eskom
Eskom Holdings SOC Limited
P.O. Box 1091
Johannesburg
2000

URGENT

Dear Mr. Khoza

**Development Bank of Southern Africa Limited (DBSA) / Eskom Holdings Limited
(Eskom) - Term Loan Facility Agreement**

- 1 We refer to the meeting of Category 1 Creditors convened by Eskom on 18 July 2017 and attended by the National Treasury, the Department of Public Enterprises and the DBSA.
- 2 We confirm that the DBSA has agreed not to enforce its rights under clause 16.1 and specifically clause 16.1.4 of the Agreement until close of business on 25 July 2017.
- 3 The DBSA requires Eskom to provide to the DBSA the following by 17h00 on 25 July 2017:
 - 3.1 Full disclosure of the events that led to the event of default based on Eskom's understanding of those events as at 25 July 2017;
 - 3.2 The Eskom Audit Committee's written approval of the detailed plan of mitigating measures Eskom proposes putting place and remedial action Eskom proposes taking to address the events that led to the event of default;

PJ Molekale (Chairman), PM Baleni (Deputy Chairman),
PK Dlamini (Chief Executive), Luthengo-Baloyi B. Mabuza
D. Marolea A. Mokoale, G. M. M. Nkomo, A. Seng, A. Seng,
M. Swilling, M. J. van Rensburg, M. J. Ngqeleni
Executive
Batholovic, Sonnet (Company Secretary)

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- 3.3 A detailed plan of mitigating measures Eskom proposes putting place and remedial action Eskom proposes taking to ensure that Eskom's audited financial statements will not again be qualified; and
- 3.4 Written confirmation, to the satisfaction of DBSA, that Eskom has properly identified and suspended or placed on special leave those employees or directors or officers who played a role in the events leading up to the qualification of Eskom's audited financial statements and control failures around Eskom's contract management;
- 3.5 Evidence of immediate action taken at senior management level where allegations have been made of fiduciary responsibilities which have been compromised.
- 4 The agreement on the part of DBSA not to enforce its rights will automatically terminate at 17h00 on 25 July 2017 unless DBSA in its sole discretion and subject to internal approval, decides to extend the 7 day period or to amend clause 16.1.14 of the Agreement.
- 5 All our rights are and continue to remain reserved.

Yours Sincerely


Patrick K. Dlamini
Chief Executive Officer and Managing Director (DBSA)

CC: Mr PJ Moleketi, Chairman of the DBSA Board
 Mr JA Dladla, Interim Group Chief Executive Officer
 Ms S. Daniels, Company secretary for distribution to the board of Eskom
 Mr D. Mogajane, Director General: National Treasury
 Mr RM Seleke, Director General: Department of Public Enterprises

PJ Moleketi (Chairman), FM Salani (Deputy Chairman),
 PK Dlamini (Chief Executive), L Bhengu-Baloyi, B Mabasa,
 D Marole, A Moleketi, G Mthembu, K Naidoo, A Sing,
 M Swilling, M J van Rensburg, M J Ngweni,
 Executive
 Bantshile Sowazi (Company Secretary)

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 1615, South Africa, Gauteng






Mr Patrick K Dlamini
Chief Executive Officer
Development bank of Southern Africa
1258 Lever Road Headway Hill
MIDRAND

Dear Mr Dlamini

DEVELOPMENT BANK OF SOUTHERN AFRICA LIMITED (DBSA)/ESKOM HOLDINGS LIMITED (ESKOM) – TERM LOAN FACILITY AGREEMENT

We refer to your letter dated 19 July 2017 addressed to our Mr Khoza (your letter) as well as the meeting with our Mr Khoza earlier today.

We take note of the content of paragraph 2 of your letter, which we assume was intended to constitute a waiver until close of business on 25 July 2017, in keeping with the wording of the Term Loan Facility Agreement and the statement made at the lenders meeting of 18 July 2017 (Lenders Meeting), by your legal advisor.

As indicated to you, we hereby request that you extend the waiver referred to above until close of business on 28 July 2017. We are committed to addressing the issues raised in your letter, but are also mindful of the requirements of applicable legislation in this regard.

As we have discussed, we propose a further formal engagement with you in this regard in order to share our planned process with you in satisfaction of this requirement. We also intend to involve our shareholder in such engagement.

We trust that you will give the provisions of this letter your kind consideration.

Yours sincerely

Mr Zethembe Khoza
INTERIM CHAIRMAN

Date: 25/07/2017

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DBSA

Development Bank
of Southern Africa

26 July 2017

Mr. Z Khoza
Interim Chairman of the Board of Eskom
Eskom Holdings SOC Limited
P.O. Box 1091
Johannesburg
2000

URGENT

Dear Mr. Khoza

Development Bank of Southern Africa Limited (DBSA) / Eskom Holdings Limited (Eskom) - Term Loan Facility Agreement

- 1 We refer to our letter dated 19 July 2017 and Eskom's response dated 25 July 2017.
- 2 Paragraph 2 of our letter dated 19 July 2017 constituted an agreement by the DBSA not to enforce its rights under clause 16.1 and specifically clause 16.1.4 of the Agreement until close of business on 25 July 2017. The DBSA made it clear that the agreement would automatically terminate at 17h00 on 25 July 2017 unless DBSA in its sole discretion and subject to internal approval, decided to extend the 7 day period which terminated on 25 July.
- 3 Eskom's letter under reply makes no attempt to address DBSA's requirements as set out in paragraph 3 of its 19 July 2017 letter. Having received Eskom's letter shortly before close of business on 25 July 2017, the DBSA could not and did not agree on 25 July 2017 to extend the 7 day period.

P.J. Moleketi (Chairman), F.M. Baleani (Deputy Chairman),
P.K. Dlamini (Chief Executive), L. Bhengu, B. Boleyi, B. Mabuza,
D. Marole, A. Moloto, G. Molewa, K. Naidoo, A. Sing,
M. Swilling, M. U. van Rensburg, M. T. Ngqaleni.

Executive

Bathobile Sowazi (Company Secretary)

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www.dbsa.org 1695, South Africa, Gauteng

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- 4 The DBSA is now faced with the unsatisfactory position of having to agree an extension of the time period after its lapse, without any progress having been communicated to the DBSA on the issues raised in paragraph 3 of the 19 July 2017 letter.
- 5 In the circumstances the DBSA has no choice but to put an ultimatum to Eskom that it complies with the requirements in paragraph 3 of the 19 July 2017 letter by 17h00 on 28 July 2017. In particular and with reference to paragraph 3.4 of that letter, DBSA specifically requests the board of Eskom, by the extended date and time, to:
 - 5.1 reflect on Eskom Group CFO's role in the events leading up to the qualification of Eskom's audited financial statements and the control failures around Eskom's contract management; and
 - 5.2 suspend the current CFO or to place him on special leave to enable an independent and transparent investigation to be conducted into his role at Eskom.
- 6 We await your response by 17h00 on Friday, 28 July.
- 7 All our rights are and continue to remain reserved.

Yours Sincerely


Patrick K. Dlamini
 Chief Executive Officer and Managing Director (DBSA)

PJ Moleketi (Chairman), FM Baleni (Deputy Chairman),
 PK Dlamini* (Chief Executive), J. Bhengu-Baloyi, B Mabuza,
 D Marole, A Moloto, G Molewa, K Naidoo*, A Sing,
 M Swilling, M J van Rensburg, M T. Ngqaleni.

*Executive

Bathabile Sowazi (Company Secretary)

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 www.dbsa.org 1685, South Africa, Gauteng



Mr Patrick K Dlamini
Chief Executive Officer and Managing Director
Development Bank of Southern Africa ("DBSA")
PO Box 1234
Halfway House
MIDRAND
1685

Dear Mr Dlamini

**ESKOM HOLDINGS LIMITED ("ESKOM") – TERM LOAN FACILITY AGREEMENT
WITH DBSA (THE "FACILITY")**

We refer to your correspondence dated 19 and 26 July 2017 and wish to confirm that Eskom remains committed to addressing the issues raised in these letters and are also mindful of the requirements of applicable legislation in this regard.

For ease of reference, the paragraph numbers of your letters dated 19 July and 26 July respectively, are utilised hereunder:

Ad paragraph 3.1

In our letter to you of 14 July 2017 (in reply to your letter of the same date) and at paragraph 10(a) thereof, we had provided certain disclosures of events leading to the event of default. Events have not changed since the date of that letter but we are progressing to address the corrective measures in accordance with our plan.

Ad paragraph 3.2

Eskom's Audit and Risk Committee approved the detailed plan of mitigating measures.

Ad paragraph 3.3

Kindly find attached the Eskom detailed plan of mitigating measures Eskom proposes to take to ensure that Eskom's audited financial statements will not again be qualified.

Ad paragraphs 3.4 and 5 (of the 26 July letter)

As indicated, we are committed to address the issues that caused the qualification of our financials and have embarked on an orderly investigative process in that regard. We are mindful of the requirements of applicable legislation as well as the pending parliamentary enquiry but are concerned that the short timeline required.

Pursuant hereto, the Eskom board has now placed the current GCFO, Mr Anoj Singh, on special leave pending an investigation into the events leading up to the qualification of the Eskom financials and the control failures in relation to the contract management function within Eskom as well as generally his role in certain events which took place at Eskom.

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Eskom Holdings SOC Ltd Reg No 2002/015527/30

Ad paragraph 3.5

In respect to this requirement, we assume that you are referring to current and former directors. As you are aware, these individuals have dual relationships with Eskom, firstly as employee and secondly as director. The board would need to follow the processes and procedures of the laws applicable.

We propose a formal engagement with you in order to share our planned process in satisfaction of this requirement.

Waiver and amendment

As we have consistently maintained, it is the utmost priority for Eskom that this situation is urgently resolved so that the event of default contained in clause 16.1.4 of the Term Loan Facility Agreement is fully and unconditionally waived in respect of this audit period so that it is clear to us that no event of default exists or is continuing under the facility.

Based on our meeting of 27 July 2017, we understand that the DBSA is now in a position to confirm that the conditions placed upon the waiver have been remedied to its satisfaction for the purposes of the Term Loan Facility Agreement, and that as such, now fully and unconditionally waives the breach of the Term Loan Facility.

In order to ensure that a qualification would not cause a default in the future, Eskom proposes that the Term Loan Facility Agreement be amended to move the specific event of default provision to a prepayment event with certain conditions attached, which we trust you will find acceptable. Accordingly, we attach hereto a proposed letter which confirms the waiver for your consideration and sign off.

Kindly be aware until such time as the above has been finalised, we will not be able to engage effectively with any of our lenders.

I look forward to your favourable response.

Yours faithfully


Johnny A. Dladla
INTERIM GROUP CHIEF EXECUTIVE

Date: 28.07.2017

Amendment and Waiver Letter
[On DBSA's Handed Note Paper]

To: Eskom Holdings SOC Limited
Megawatt Park
1 Maxwell Drive
Sunninghill
Sandton

Date: 27 July 2017

Dear Sirs

Amendment and Waiver Letter

We refer to the term loan facility agreement dated 4 November 2010 (the "Agreement") and made between Eskom Holdings SOC Limited (formerly Eskom Holdings Limited) as borrower and ourselves as lender and to our letters of 19 July 2017 and [26] July 2017 (the "Initial Waiver Letters").

Save as defined in this Letter, words and expressions defined in the Agreement shall have the same meanings when used in this Letter.

In this Letter "Effective Date" means the date upon which we have received a copy of this Letter duly countersigned by the Borrower.

1. We agree that with effect from the Effective Date:
 - (a) any breach of the Clauses of the Agreement set out in Schedule 1 (*Agreement Waivers*) of this Letter shall be fully and unconditionally waived for all purposes and hereby confirm that any conditions set out, referred to or implied in the Initial Waiver Letters in relation thereto have been fully and unconditionally remedied to our satisfaction;
 - (b) we have not and will not claim any amount from the Borrower under clause 12.1.1 in relation to any loss or liability we have incurred or may incur as a result of the breaches referred to in (a) above; and
 - (c) the amendments to the Agreement set out in Schedule 2 (*Agreement Amendments*) of this Letter shall be deemed made,in each case, on the terms and conditions (if any) stated.
2. Save as waived or amended by this Letter, the provisions of the Agreement shall continue in full force and effect and the Agreement and this Letter shall be read and construed as one instrument.
3. With effect from the Effective Date, references in the Agreement to "this Agreement" shall, unless the context otherwise requires, be construed as references to the Agreement as waived or amended by this Letter.
4. This Letter may be executed in counterparts each of which, when taken together, shall constitute one and the same agreement.

5. This letter shall be governed by and construed in accordance with the laws of South Africa.

Please sign, date and return the enclosed copy of this Letter to signify your acceptance and acknowledgement of its terms and conditions.

Yours faithfully,

For and on behalf of
**Development Bank of Southern Africa
 Limited**
 as Lender under the Agreement

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.....

We acknowledge receipt of your Letter of 28 July 2017 of which this is a copy and hereby confirm our acknowledgement and agreement to the terms and conditions stated in it.

Yours faithfully,

For and on behalf of
Eskom Holdings SOC Limited

}

.....

Date:

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Schedule 1

Agreement Waivers

The Lender fully and unconditionally waives for all purposes any breach or potential breach of the following clauses which have or may have been caused by (i) the circumstances giving rise to the issuance of a qualified audit opinion on the Borrower's financial statements for the year ended 31 March 2017, including but not limited to the provisions of the PFMA or (ii) Sizwe Ntsaluba Gobodo reporting the Independent Regulatory Board for Auditors certain irregularities in respect of the same:

1. Clause 11.2.2 of the Agreement;
2. Clause 11.2.10 of the Agreement;
3. Clause 16.1.3 of the Agreement;
4. Clause 16.1.14 of the Agreement; and
5. Any other Clauses of the Agreement that could or may be affected by the above.

Schedule 2

Agreement Amendments

The following amendments to the Agreement will be made with effect from the Effective Date:

- Clause 16.1.14 shall be deleted in its entirety.
- The following shall be inserted as a new Clause 9.2.8:

"Qualified Accounts

9.2.8 If a qualified audit report is issued in respect of the Borrower's financial statements and/or the auditors of the Borrower notes that a reportable irregularity has occurred in respect of the Borrower's financial statements, the Lender may by notice to the Borrower:

9.2.8.1 require the Borrower to attend a meeting to discuss the circumstances giving rise to such a qualification or report and agree a remedial plan with the Borrower to resolve the same prior to the end of the then next Financial Year; and

9.2.8.2 if the Parties fail to agree an appropriate remedial plan within three months of the date the Lender first requires the Borrower to attend such meeting or the Borrower has not resolved the issues prior to the end of the then next Financial Year, declare that the Facility Outstandings together with all Break Costs and Unwinding Costs be due and payable, whereupon the Borrower shall repay the Facility Outstandings and Break Costs and Unwinding Costs no later than 30 (thirty) days after receipt of such notice from the Borrower."



The Honourable Ms Lynne Brown (MP)
Minister of Public Enterprises
Infotech Building, Suite 401
1090 Arcadia Street
Hatfield
Pretoria
0001

Dear Minister

REMUNERATION: MR B MOLEFE

The appointment of Mr. B Molefe as Chief Executive of Eskom with effect from 1 October 2015 has reference.

Please find set out herein, a proposal on his remuneration for your consideration.

The table below reflects the September 2015 benchmarks conducted by Mercer, PE Corporate Services and Deloitte Consulting for a Chief Executive of a large company.

Individual Surname	Designation	Current Remuneration Guaranteed Package RUB	MERCER Per Category LQ	MERCER Per Category MEDIAN	MERCER Per Category UQ	PE Corporate Services - LQ	PE Corporate Services - MEDIAN	PE Corporate Services - UQ	Deloitte Average
B Molefe	CHIEF EXECUTIVE	7 656 000	6 634 445	8 466 256	12 329 152	7 138 105	8 068 792	9 261 935	10 560 000

The benchmarks reflect that the current remuneration, as paid by Transnet, of Mr. Molefe is below the following statistical measurements, that is:

- 10.6% below the median of Mercer
- 5.4% below the median of PE Corporate Services and
- 37.9% below the average of Deloitte Consulting. The Deloitte benchmark is based on listed JSE companies of similar size.

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In keeping with his current remuneration paid by Transnet and taking the benchmarks into consideration, I submit for your approval the following annual recommended total guaranteed remuneration package:

EXECUTIVE	POSITION	TOTAL GUARANTEED PACKAGE
B Molefe	Chief Executive	R7 656 000.00

Minister's favorable consideration hereof would be appreciated. Should Minister have any queries hereon, please do not hesitate to contact me.

Thanking you in anticipation.

Yours sincerely


Dr Baldwin Ngubane
CHAIRMAN

Date: 16/10/15

APPROVED

Ms Lynne Brown (MP)
MINISTER OF PUBLIC ENTERPRISES
Date:

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MINISTRY
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Maitland, 6225 Tel. (012) 431 1315/1150 Fax. (012) 431 1630
P.O. Box 23072, CAPE TOWN, 8000 Tel. (021) 491 8376/77-00 4760 F.-r (021) 495 233 1451 1741

Dr. B Ngubane
Chairperson
Eskom Holdings SOC Limited
P.O. Box 1091
Megawatt Park
Johannesburg
2000

Tel: 011 800 5808
Fax: 011 800 4938
Email: Baldwin.ngubane@gmail.com/
DanielSM@eskom.co.za

Dear Dr Ngubane

Re: Remuneration of Mr B Molefe: Chief Executive of Eskom

Your letter regarding the above-mentioned matter, dated 18 October 2015, has reference.

After having seen the contract of employment between Mr Brian Molefe and Transnet SOC Limited and the recommendations of the Board, I hereby approve the total guaranteed remuneration of R7 656 000.00 to Mr Molefe with effect from the date of appointment.

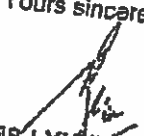
Following my letter to you, dated 2 October 2015, Cabinet further noted the appointment, subject to the period of employment being confirmed. In this regard, it is my view and that of Cabinet that the period of employment be stipulated as five (5) years, subject to annual performance reviews.

The specified term of the employment contract must also apply to the Chief Financial Officer.

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I look forward to receiving the draft employment contract and performance agreement as requested in the aforementioned letter.

Yours sincerely


MS LYNNE BROWN, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 1/11/2015

M.16
Page 100



The Hon Ms Lynne Brown (MP)
Minister of Public Enterprises
Infotech Building, Suite 401
1090 Arcadia Street
Hatfield
Pretoria
0001

Dear Minister

RETIREMENT ARRANGEMENTS – BRIAN MOLEFE

As requested by the minister, Eskom is currently drafting the Group Chief Executive's 5 year contract for the minister's input.

As part of the drafting process, however, an important principle regarding Mr Molefe's retirement fund needs to be addressed and I request the minister's prior approval before we submit the draft contract for further input.

It is a fact that the growth in retirement investments and pension funds start off slow but increases exponentially towards the end of an employee's working life. Mr. Molefe has served in numerous high ranking South African organisations at executive level, essentially to stabilise and ensure the future sustainability and performance of those organisations. Due to the nature of these engagements and the short term contractual obligations in Mr Molefe's case, he has not been able to benefit from the growth opportunity in a single pension fund.

To breach this gap, the following contractual stipulations are proposed:

- Regardless of Mr Molefe age after the 5 year termination date, he be allowed to retire from Eskom's service on the basis that he is aged 63.
- That the penalties prescribed by the Eskom Pension and Provident Fund (EPPF) for retirement prior to age 63, be waived.

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Tel +27 11 800 2030 Fax +27 11 800 5803 www.eskom.co.za
Eskom Holdings SOC Ltd Reg No 2002/015627/30

M.K

Bug

RETIREMENT ARRANGEMENTS – BRIAN MOLEFE (Continued)

- That Eskom carries the cost of such penalties (to be paid over to the EPPF).
- In the event that Mr Molefe's contract is not extended beyond the 5 year termination date, he will not be allowed to subscribe to any other SOC or government pension fund.
- Should the contract be extended, however, it is important to note that the cost of any subsequent penalties (actuarial value) will decrease proportionately.

trust that this will receive the minister's favorable approval.

Yours sincerely


Dr Balewin Ngubane

CHAIRMAN

Date:

25/11/15

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Bucy





public enterprises

Department
Public Enterprises
REPUBLIC OF SOUTH AFRICA



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Home > Newsroom > Minister Brown declines Brian Molefe's pension pay-out



Minister Brown declines Brian Molefe's pension pay-out

23/04/2017

Minister Brown declines Brian Molefe's pension pay-out

23/04/2017

The Minister of Public Enterprises, Ms Lynne Brown, has declined Eskom's proposal to pay its former Group Chief Executive, Mr Brian Molefe, a R30-million pension pay-out.

"I have considered the Eskom Board's reasoning in formulating the proposed pension payout and cannot support it.

"I found the argument presented by the Board on why the pension arrangement was conceived lacking in legal rationale, and it cannot be substantiated as a performance reward because Mr Molefe has already been granted a performance bonus for his contribution to the turnaround of Eskom.

"Nor is the proposed pension payout justifiable in light of the current financial challenges faced not only by State-Owned Companies (SOCs), but by the country as a whole.

"I have in the past asked Eskom and the other five SOCs in my portfolio to demonstrate financial prudence and social consciousness when considering executive emoluments.

"Given that I was not a party to the contract of employment concluded between the Eskom Board and Mr Molefe, I have instructed the Board to urgently engage Mr Molefe and report back to me with an appropriate pension proposal within seven days.

"It is unfortunate that such a sensitive and private matter was handled so recklessly.

"Finally, I have asked the Board to investigate how its proposal got into the public domain prior to my having had the opportunity to consider it," Minister Brown said.

For enquiries contact Colin Cruywagen on 082 3775916.

Issued by the Ministry of Public Enterprises

23 April 2017

1042

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About Us	Deputy Minister	Press Gallery	1090 Arcadia Street
State Owned Companies	Deputy Minister	Speeches	Initech Building
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The Honourable Ms Lynne Brown MP
Minister of Public Enterprises
Private bag X15
HATHFIELD
0028

Dear Minister Brown

BRIAN MOLEFE – EARLY RETIREMENT

The above matter has reference.

Following on our meetings as well as your instruction, the Board of Directors has rescinded its decision to approve Mr Molefe's application for early retirement as submitted in November 2016. This decision is based on your instructions and our engagements.

We were requested to forward a palatable pension proposal. We have considered whether this is achievable within the Eskom Pension and Provident Fund Rules. Unfortunately, it is not possible to secure an alternative palatable pension proposal. We also established that a 1/3 payment has already been made by Eskom to the Pension Fund in terms of Eskom approving Mr Molefe's early retirement application.

However, in order to achieve your objective, we sought legal counsel and the following options were considered:

a) Consensual Rescission of the Early Retirement

In this scenario the employee agrees that his application for early retirement be rescinded, the status quo will therefore have to prevail.

In this regard, the employee would (i) pay back any monies he received to Eskom, (ii) as well as to the EPPF pursuant to his early retirement; (iii) pay back to Eskom any monies he received pursuant to the termination of his employment; (iv) resume employment as the CEO of Eskom; and (v) the employee would need to be reinstated as a director of the Board of directors.

BA

b) Non-Consensual Rescission

In this scenario, should the employee not agree that his approval for early retirement be rescinded, Eskom will, in order to effect the Minister's instruction as set out in the media release on Sunday, 23 April 2017, be required to bring an application to overturn its decision of 21 November 2016, as well as attempt to overturn the EPPF's decision which was made pursuant to rule 28(3) of the EPPF Rules ("Rules").

If Eskom does not bring such an application, the Minister may institute an action against Eskom on the basis that its decision of 21 November 2016, to accept the early retirement, was irrational and unreasonable. Also, the EPPF will be joined as a party to the proceedings.

c) Resignation

In this scenario, the Board would advise the employee that his application for early retirement has been rescinded. He can thereafter opt to resign from Eskom's employ. He would be entitled to his normal retirement benefits in terms of the Rules. Eskom may agree that the employee may retain the monies paid to him which were not linked to his early retirement as set out in the first paragraph of the letter dated 24 November 2016.

d) Settlement Payment

In this scenario, the parties may agree that the employee's approval of early retirement is rescinded. However, they would pay to him a settlement amount. This is commonly known as a 'golden handshake'.

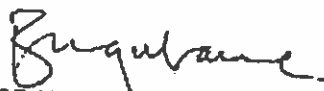
2. All these options were considered at a special Board meeting and the decision was made to engage Mr Molefe hereon.
3. In accordance with Ministers' instructions the parties attempted to find a mutually acceptable pension proposal.
4. After a series of engagements the parties were unable to reach such agreement.
5. The Board therefore resolved to rescind its approval of Mr Molefe's retirement application and tendered resumption of his duties as Group Chief Executive Officer with effect from 15 May 2017.
6. A reinstatement agreement was proposed and accepted between the parties. This agreement is required for various administrative issues to be reversed and also to be presented to the Eskom Pension and Provident Fund for ensuring the exit of the early retirement proposal. As this is simply a reinstatement of his employment, Counsel has advised that neither you nor Cabinet's formal approval is required for Mr Molefe to resume his duties as an employee. However, given our relationship and in order to avoid any misunderstanding your approval is nevertheless requested.

CG R

7. As a result of the rescission of the board resolution the status quo ante 24 November 2016 will be restored
8. A copy of the letter and agreement issued to Mr Molefo is attached hereto.

I trust that Minister will find this in order.

Yours sincerely


Dr BS Ngubane
CHAIRMAN
Date: 11/05/17

GCL 



Mr Brian Molefe
ID 6612285778086

Dear Brian

YOUR EARLY RETIREMENT

- 1 The above matter has reference.
- 2 With effect from 1 October 2015, you were appointed as Eskom Holdings SOC Limited's ("Eskom") Group Chief Executive.
- 3 An employment agreement was signed by the parties on 7 March 2016 ("the employment agreement").
- 4 On 11 November 2016, you requested the Eskom Board to approve your application for early retirement in terms of the Eskom Pension and Provident Fund Rules ("Rules") read in conjunction with People and Governance Committee resolution dated 9 February 2016. You further indicated that your last day of service would be 31 December 2016.
- 5 Eskom issued a letter accepting your application for early retirement on 24 November 2016 ("the Retirement Agreement").
- 6 The Board of Eskom has resolved to rescind the Retirement Agreement. Consequently, the Board tenders resumption of your duties as Group Chief Executive Officer by 15 May 2017, on the basis set out in the re-instatement agreement signed between us.

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Eskom Holdings SOC Ltd Reg No 2002/015527/30

- 7 --Should the terms of this proposal be acceptable to you, kindly sign a copy of this letter and return to the Company Secretary by close of business on the 12 May 2017.

Yours sincerely

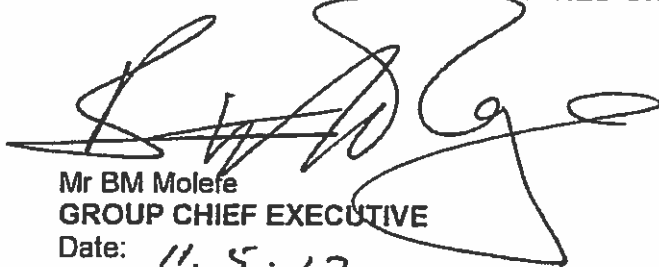


Dr BS Ngubane

CHAIRMAN

Date: 11/05/17

I ACCEPT THE TERMS OF THIS LETTER READ TOGETHER WITH MY
EMPLOYMENT AGREEMENT SIGNED ON 7 MARCH 2016 AND THE
REINSTATEMENT AGREEMENT SIGNED ON 12 MAY 2017.



Mr BM Molefe

GROUP CHIEF EXECUTIVE

Date: 11. 5. 17.



REINSTATEMENT AGREEMENT

between

ESKOM HOLDINGS SOC LIMITED

and

BRIAN MOLEFE

[Handwritten signatures]

1 PARTIES

1.1 The Parties to this Agreement are –

1.1.1 ESKOM HOLDINGS SOC LIMITED; and

1.1.2 BRIAN MOLEFE.

1.2 The Parties agree as set out below.

2 INTERPRETATION

In this Agreement –

2.1 "Agreement" means this reinstatement agreement;

2.2 "Eskom" means Eskom SOC Holdings Limited, a juristic body created by virtue of the Eskom Act, No. 40 of 1987, as amended from time to time, having its head office at Megawatt Park, Maxwell Drive, Sunninghill,

2.3 "Eskom Pension and Provident Fund" means a pension fund established by the Pension Funds Act, 24 of 1956 which came into operation on 1 January 1950 and was registered on 21 April 1958;

2.4 "Molefe" means Brian Molefe with identity number 6612285778086;

2.5 "Parties" means the parties to this Agreement;

2.6 "Principal Agreement" means the employment agreement signed between the Parties on 7 March 2016 relating to Molefe's appointment as Group Chief Executive of Eskom, a copy of which is annexed hereto marked annexure "A"; and

2.7 words and phrases defined in the Principal Agreement or in the annexures to the Principal Agreement will bear the same meanings herein.

3 INTRODUCTION

3.1 The Parties entered into the Principal Agreement

3.2 On 11 November 2016, Molefe applied for early retirement. A copy of Molefe's early retirement application is attached marked "B".

3.3 On 24 November 2016, Eskom issued a letter accepting Molefe's early retirement. A copy of the acceptance letter is attached marked "C" ("Retirement Agreement").

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3.4 The Board has elected to rescind the decision to approve Molefe's application for early retirement.

3.5 The Parties accordingly agree as set out herein.

4 PRINCIPAL AGREEMENT

For the avoidance of doubt, the Principal Agreement shall continue on its terms.

5 RESUMPTION OF DUTIES

Molefe shall resume his duties in terms of the Principle Agreement on 15 May 2017. Eskom shall take all administrative steps necessary to give effect to this Agreement.

6 REPAYMENT OF MONIES BY MOLEFE TO THE FUND

Molefe agrees to pay to the Fund all amounts due to the Fund which were paid to him pursuant to the Retirement Agreement by no later than 30 November 2017.

7 PERIOD BETWEEN 1 JANUARY 2017 TO 15 MAY 2017

The period between 1 January 2017 and 15 May 2017 will be regarded as unpaid leave.

8 WHOLE AGREEMENT

This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated herein shall be binding on the Parties.

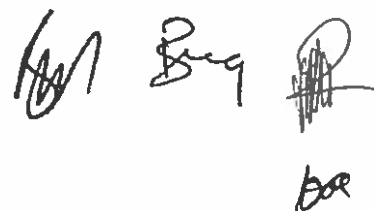
9 COSTS

Each Party will bear and pay its own legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this Agreement.

10 SIGNATURE

10.1 This Agreement is signed by the Parties on the dates and at the places indicated below.

10.2 This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.



ba

- 10.3 The persons signing this Agreement in a representative capacity warrant their authority to do so.
- 10.4 The Parties record that it is not required for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.

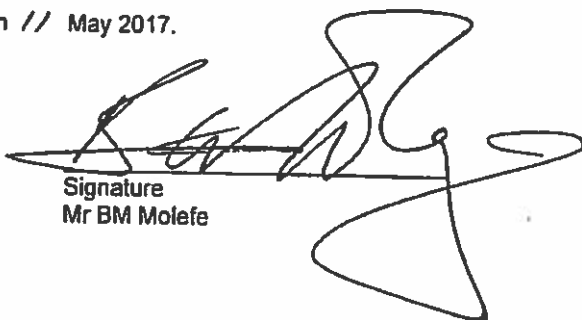
SIGNED at *Summerville* on 11 May 2017.

For and on behalf of

ESKOM HOLDINGS SOC LIMITED


Signature
Dr BS Ngubane
Chairman

SIGNED at *Cape Town* on 11 May 2017.


Signature
Mr BM Molefe



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REPUBLIC OF SOUTH AFRICA




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 33051/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO YES
(3)	REVISED.


25/1/18

In the matter between:

DEMOCRATIC ALLIANCE

and

THE MINISTER OF PUBLIC ENTERPRISE

ESKOM HOLDINGS LIMITED

BRIAN MOLEFE

AND

Applicant

First Respondent

Second Respondent

Third Respondent

Case No: 34568/2017

In the matter between:




ECONOMIC FREEDOM FIGHTERS

Applicant

and

ESKOM HOLDINGS LIMITED

First Respondent

MINISTER OF PUBLIC ENTERPRISE

Second Respondent

BRIAN MOLEFE

Third Respondent

NATIONAL UNION OF MINeworkERS

Fourth Respondent

AND

Case No: 34042/2017

In the matter between:

SOLIDARITY TRADE UNION

Applicant

and

BRIAN MOLEFE

First Respondent

MINISTER OF PUBLIC ENTERPRISES

Second Respondent

ESKOM HOLDINGS SOC LIMITED

Third Respondent

JUDGMENT

MATOJANE J

Introduction

[1] Before us are three separate but consolidated applications brought by the Democratic Alliance ("DA"), Solidarity Trade Union ("Solidarity") and the Economic Freedom Fighters ("EFF"). The applications have a common feature, namely to

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review and set aside the decision of the Minister of Public Enterprises to appoint and /or reinstate, the third respondent, Mr. Molefe to the position of Group Chief Executive at Eskom after he had departed from Eskom on a purported early retirement agreement.

[2] On 2 November 2016, the Public Protector released a report entitled "the State of Capture" which was the culmination of the investigation by the Office of the Public Protector into alleged improper and unethical conduct by the President and other state functionaries. The report contains damaging allegations against Mr. Molefe of abusing his position at Eskom to benefit the Gupta family in the improper and possibly corrupt awarding of state contracts and benefits to the Gupta family's businesses.

[3] On 11 November 2016, stung by the contents of the Report and its possible implications to Eskom, Mr. Molefe, announced in a televised press conference that he was leaving his employ at Eskom from 1 January 2017. He stated that he was doing so voluntarily as that would be in the interests of good governance at Eskom to do so. He expressed his confidence in being able to demonstrate, at an appropriate time, that he had done nothing wrong.

[4] It transpired later that on the same day, Mr. Molefe submitted a request for early retirement. The request was granted in the letter dated 24 November 2016, and under it, an early retirement agreement was concluded with Eskom effective on 1 December 2016. The agreement permitted Mr. Molefe to proceed on retirement from age 50, with Eskom making up the shortfall regarding the ten-year service requirement in terms of the rules of the Pension Fund.

[5] The Minister was never informed that Mr. Molefe had applied for early retirement and that such an agreement had been concluded.

[6] On 23 February 2017, Mr. Molefe joined the National Assembly as a member of Parliament representing the African National Congress ("ANC"). Eskom duly advertised the position of Group Chief Executive Officer.



[7] In consequence of his purported early retirement, Mr. Molefe elected to receive one-third of his retirement benefits as a lump sum payout. The Fund has paid a total amount of R10 327 074.53 in pension benefits to Mr. Molefe.

[8] On 16 April 2017, the Sunday Times reported that Mr. Molefe had received an R30.1 million pension pay-outs. Following the media outcry and the intervention of the Minister, the Eskom Board resolved to "rescind" the early retirement agreement and entered into the Reinstatement Agreement with Mr. Molefe. The reinstatement agreement purports to revive Mr. Molefe's terminated contract for him to resume his duties at Eskom. The period he was a parliamentarian was to be regarded as unpaid leave, and Mr. Molefe was to repay to the Eskom Provident Fund ("EPPF") all amounts paid to him.

[9] Mr. Molefe returned to his employment duties on 15 May 2016. The Minister addressed a letter to the Eskom Board directing the Board to rescind its decision to reinstate Mr. Molefe on the basis that "the appropriate process was not followed in the appointment of Mr. Molefe." Eskom subsequently informed Mr. Molefe on 2 June 2017 that the Reinstatement Agreement was rescinded.

[10] On 4 June 2017, Mr. Molefe launched a parallel application in the Labour Court contending that he was summarily and unlawfully dismissed by Eskom on 2 June 2017. Mr. Molefe did not cite the DA in its application in the Labour Court. The DA was granted leave to intervene in the matter with costs, and the application has been stayed pending the outcome of this application.

[11] The Eskom Pension and Provident Fund ("EPPF") has launched a counter application to reverse its acceptance of Mr. Molefe's retirement should Mr. Molefe's early retirement agreement be set aside.

The relief sought

[12] The DA seeks an order in the following terms;

- 11.1 Reviewing and setting aside the decision made by the Minister to appoint and reinstate Mr. Molefe to the position of Group Chief Executive at Eskom;
- 11.2 Declaring that any payment or sum of money received by Mr. Molefe under any purported pension agreement between him and Eskom to be invalid and ordering Mr. Molefe to repay such amounts within ten days of this order.

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[13] Solidarity asks for an order declaring as unconstitutional and invalid and setting aside the following decisions which it says were made by the board and the Minister

- "3.1 the decision taken "around" 9 February 2016 to approve a "pension carve out" for Mr. Molefe in terms of which he was "granted significantly greater early retirement benefits than he would otherwise have been entitled to under the Eskom Pension and Provident Fund Rules, and which would come at a significant cost to Eskom
- 3.2 the decision taken in November 2016 to accept Mr. Molefe's "early retirement" proposal, and any and all steps were taken under it.
- 3.3 the decision was taken "in or about May 2017 to "reinstate" Mr. Molefe to his position as Group Chief Executive of Eskom."

[14] Solidarity also seeks an order directing the Director of Prosecutions to investigate Mr. Molefe's and the Eskom Board's actions in respect of the above-impugned decisions. The DPP has opposed this relief and Solidarity has abandoned it.

[15] The EFF seeks, amongst others the order:

- 13.1 declaring that the decision of the Board to re-appoint Mr. Molefe "as Chief Executive Officer" is irrational, unlawful, unconstitutional and invalid.
- 13.2 Declaring that members of the Eskom Board have acted in breach of their fiduciary duties owed to Eskom
- 13.3 Directing the Minister to "forthwith" take appropriate steps to remove members of the Board

[16] The Minister and Eskom do not oppose the relief sought by the DA or Solidarity as she avers that she took none of the decisions referred to above, she, however, opposes the relief by EFF that this court should direct her to remove members of the Board. Eskom abides by the Court's decision and the EFF has now abandoned the relief it sought.

[17] Mr. Molefe's case is that he never resigned but instead applied for early retirement. The early retirement agreement was the only reason for his departure from Eskom. He states that there was a common misunderstanding between him and Eskom about his early retirement and pension payments which rendered that

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retirement agreement void, with the result that the *status quo* being, his employment as Group Chief Executive Officer- was restored by operation of the law. Consequently, he argues, the Minister neither made nor was she required to make any decision as to his appointment and reinstatement and no question of a review arises.

The factual background

[18] On 11 November 2015, Mr. Molefe signed an open-ended contract of employment with Eskom accepting his appointment as Group Chief Executive Officer with effect from 1 October 2015. He subsequently received notification from the Minister through Dr. Ngubane that his conditions of employment would be altered from an open-ended contract to a fixed term contract.

[19] Mr. Molefe says that one of the concerns he had when he left Transnet (his previous employer) was that he would have to start afresh with a new pension scheme. He was 48 years old at the time. He says that he did not remain in any position for a lengthy period and was not in a position to accumulate pension benefits over time. He was concerned that at the age of 54 when his employment contract at Eskom was set to terminate, he would be a considerably less attractive candidate for employment.

[20] Mr. Molefe raised his concerns with Dr. Ngubane, the chairman of the Board of Eskom and the chair of People and Governance Committee of the Board. Eskom with the involvement of Mr. Molefe formed a plan to afford him early retirement benefits at age 50.

[21] On 15 November 2016 Mr. Minnaar, the Executive Support Manager for Eskom, wrote to the EPPF requesting calculations as to the cost to Eskom to make up for the minimum of 10 years required in terms of the rules of the Pension Fund if Mr. Molefe retires at 54 (i.e., at the end of five-year term) with Eskom waiving penalties. The EPPF advised that Eskom will have to buy service to make up the minimum ten years.

[22] On 25 November 2015, two weeks after Mr. Molefe had signed his appointment letter, Dr. Ngubane addressed a letter to the Minister. He proposed


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that Mr. Molefe's pension benefits be calculated to age 63 with penalties waived, to compensate for the fact that Mr. Molefe had been "previously employed on some short contracts and have not been in the position to accumulate pension benefits over time," the letter stated:

"due to the nature of this engagement in the short term contractual obligations in Mr. Molefe's case, he has not been able to benefit from the growth opportunity in a single pension fund.

to bridge this gap, the following contractual stipulations are proposed:

- *regardless of Mr. Molefe's age after the five-year termination date, he will be allowed to retire from Eskom's service on the basis that he is aged 63.*
- *That the penalties prescribed by the Eskom Pension and Provident fund ("EPPF") for retirement before age 63, be waived*
- *That Eskom carries the cost of such penalties (to be paid over to the EPPF)*
- *if Mr. Molefe's contract is not extended beyond the five-year termination date, he will not be allowed to subscribe to any other SOC or government pension fund.*

[23] Although the Minister's assistant, Ms. K Davids and Mr. K Mhlongo from the Registry of the Ministry of Public Enterprises acknowledged receipt of Dr. Ngubane's letter and undertook to bring the letter to the Minister's attention, the Minister is adamant that the letter never came to her attention, and she was accordingly not aware of the proposal that Mr. Molefe should be permitted to retire on the basis of an age of 63.

[24] Dr. Ngubane's letter of the 25 November 2015 is significant for what it does not mention. Mr. Molefe was previously employed in senior positions at National Treasury for approximately seven years. He was then employed as the CEO of the Public Investment Corporation (SOC) Ltd for approximately seven years. He worked for Transnet for approximately four years before he joined Eskom. Mr. Molefe received significant pension benefits at his previous positions.

[25] In his last year at Transnet in the financial year ended 31 March 2015, Mr. Molefe received a salary of R6 115 000.00, together with "Post-retirement benefit fund contributions" of R561 000. In the same year, Mr. Molefe received a long-term incentive payment of R6 835 000.00 and short-term incentive payments of R1 551 000.00.



[26] In terms of his Executive Employment Contract with Eskom, Mr Molefe received a total annual guaranteed remuneration package of R7 656 000.00. It is thus untrue that Mr. Molefe has not been in a position to accumulate pension benefits over time.

[27] On 9 February 2016, some four months after his appointment as Group Chief Executive Officer, Mr. Molefe attended a meeting of the committee of the Board of Eskom, ("the People and Governance Committee."). Mr. Molefe was not a member of this committee and did not recuse himself from its deliberations. He says that he attended the meeting as an invitee, he, however, failed to disclose his interest in the subject matter of the resolution.

[28] The Committee passed a resolution that in cases where Executive Directors decided to take early retirement and there was a shortfall regarding the EPPF ten years of service rule, Eskom would bridge the gap to make up for the ten years, waive the penalties applicable to early retirement and Eskom would refund the pension fund the actual costs for additional service added plus penalties applicable to early retirement.

[29] In terms of the resolution Mr. Molefe and other executives who were to be appointed on five-year fixed-term contracts would be able to qualify for the early retirement benefits contrary to the rules of the Pension Fund. The resolution is consistent with Dr. Ngubane's proposal in the letter to the Minister of the 25 November 2015. The Minister was not a party to that resolution and was not aware of its adoption. The resolution was never made public. The Minister only came to know of the resolution a year later when Eskom filed its answering affidavit on 22 May 2017.

[30] On 7 March 2016 Mr. Molefe concluded a five-year fixed-term contract with Eskom which replaced his original contract of employment. The contract was to run from 1 October 2015 until its termination on 30 September 2020.

[31] Clause 3.1 of the second contract deals with the period of employment and provides that:


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The Executive's employment with the Company is based on a fixed term contract that expires on 30 September 2020 ("the Termination Date"). The employment shall continue until this date subject to either Party being entitled to terminate the employment relationship by giving the other not less than 6 (six) months written notice. The Company may elect to pay the executive instead of notice.

[32] Clause 10 is headed PENSION AND PROVIDENT FUND and provides

The Executive shall continue as a member of the Eskom Pension and Provident Fund or any other fund established or participated in by the Company from time to time, subject to the rules thereof. (own underlining)

[33] Clause 1.2.15 defines "Termination Date" as "the date upon which the Executive's employment by the Company ceases or is terminated for any reason whatsoever."

[34] Clause 21 deals with resignation. It states:


"On the termination date, the Executive will *ipso facto* be deemed to have resigned as a director of the Company and any other Group Company of which he is a director at that date."

[35] Clause 19.4 is the whole agreement clause and reads:

"This agreement constitutes the whole agreement between the Parties and no warranties or representations whether express or implied have been given or made by the Company to the Executive."

[36] Mr. Molefe argues that his new contract of employment for a fixed, five-year period did not alter his entitlement to membership of the EPPF. He relies upon his original contract of employment which permitted his membership of the Fund which membership he submits was not altered by the new contract of employment.

[37] A whole agreement clause, like any other clause in the agreement must be interpreted by the intentions of the parties as reflected in words used in their ordinary and grammatical meaning having regard to surrounding circumstances known to the parties at the time of formation of the contract in order to determine what the parties intended. The purpose of the whole agreement clause is that the obligations of the parties will be determined by the written terms of the contract and not by terms of a prior contract that have not been acknowledged in the new contract which may be contradictory and irreconcilable. A "whole agreement clause" and a "no



representation clause" mean what they say. Mr. Molefe cannot rely on his original contract of employment because it is not legally relevant to the subsequent contract he concluded. See *De Villiers v McKay* NO.¹

[38] The alteration of Mr. Molefe's term of employment to five years meant that he was now a *Temporary Employee*² and not an *Eligible Employee*³ as defined. Although he was under pensionable age, he was a temporary employee as defined and was disqualified from being a member of the Eskom Pension Fund.

[39] The decision by Eskom to waive penalties and buy Mr. Molefe an extra 13 years of service totaling R30.1-million after only 15 months service at the age of 50 stretches incredulity and is unlawful for want of compliance with the rule of the EPPF. What is most disturbing is the total lack of dignity and shame by people in leadership positions who abuse public funds with naked greed for their own benefit without a moments consideration of the circumstances of fellow citizens who live in absolute squalor throughout the country with no basic services.

The early retirement agreement

[40] In terms of section 3(1) of the *Eskom Conversion Act*⁴, Eskom is deemed to be a public company incorporated in terms of the Companies Act, 1973. Section 6 of the Act provides that the Registrar of Companies must, on the date of conversion register the Memorandum and articles of association of Eskom in terms of section 63(1) of the Companies Act, and provides that the Memorandum and Articles must be "as determined by the Minister."

¹ 2008 (4) SA 161 SCA

² "Temporary Employee" is a person who is appointed for a specific purpose and whose employment will end when that purpose has been accomplished, or who is appointed for a specific period and whose employment will end at the end of that period.

"Eligible employee" means an employee who:

- (i) At the date of becoming a member, is under a pensionable age
- (ii) Is not a Temporary Employee or an employee on the London Office of Staff of an Employer.

⁴ Act 13 of 2001


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[41] The second Memorandum of Incorporation that was passed and adopted by Eskom on 1 July 2016 ("The 2016 MOI). applies in respect of the decision by Eskom to approve Mr. Molefe's early retirement on 24 November 2016 and to conclude the "early retirement agreement." The MOI locate the power to appoint and remove the Group Chief Executive Officer on the government (represented by the Minister) to the exclusion of the Board.

[42] Section 63(2) of the PFMA provides that:

"The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive."

[43] Clause 3.6 of the 2016 MOI provides that:

"3.6 The Company [Eskom] shall not:

3.6.1 appoint to or remove a Director from the Board; or

3.6.2 appoint or remove the Chairperson of the Board, Group Chief Executive or Group Chief Financial Officer other than as provided for in terms of this MOI."

[44] Clause 14.3 deals with the process of appointment and removal of the Group Chief Executive and states:

14.3.1 The Shareholder shall, on behalf of the Company, have the exclusive power, in exercising its Ownership Control under the provisions of sec 63 (2) of the PFMA, to appoint and remove the CE as an employee of the Company by the Guidelines (own underling)

14.3.3 The Shareholder's act of appointment of the Group Chief Executive binds the Company to the exclusion of the Board.

14.3.4 The Minister shall be noted as a party to any contract of employment between the Company and the Group Chief Executive.

14.3.5 The Group Chief Executive shall report to the Board and shall only become an Executive Director of the Company is appointed to the Board by the Shareholder in terms of clause 14. 1. 1 of this MOI.


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14.3.6 The Shareholder shall, on behalf of the Company have the exclusive power to remove the Group Chief Executive as an employee of the Company which removal would constitute a dismissal as envisaged in terms of Section 186(1)(a) of the Labour Relations Act 66 of 1995 ("LRA"). Consequently, the provisions of the LRA apply to any such removal."

[45] The decision by Eskom to approve Mr. Molefe's early retirement and to conclude the early retirement contract is *ultra vires* and void for non-compliance with the 2016 MOI.

[46] Despite the knowledge that Mr. Molefe was a temporary employee on a five-year fixed term executive employment contract, thus not eligible to be a member of the Pension Fund and that he was not being retrenched, Eskom provided the Fund with information that Mr. Molefe was appointed as permanent employee and requested the Fund to grant Mr. Molefe extra service in accordance with the provisions of Rule 21.4⁵ of the EPPF rules. The associated costs amounted to R30,1 million. Eskom paid this amount to the Fund.

[47] Among the documents submitted by Eskom to the Fund included a letter from Dr. Ngubane dated 24 November 2016 addressed to Mr. Molefe stating that Mr. Molefe's early retirement had been approved "in terms of Rule 28 and Rule 21.4 and that penalties will be waived and potential service to age 63 has been granted to Mr. Molefe". Attached to the affidavit was also a certain annexure "SA1" reflecting code "PPX" which it is common cause indicates permanent executive employment in the F-band.

[48] The Eskom Pension and Provident Fund is a defined benefit pension fund that is registered as a self-administered pension fund in terms of the Pension Funds Act⁶ 24 and approved as a pension fund in terms of the Income Tax Act 58 of 1962. Section 13 of the Pension Fund Act is headed "Binding force of rules" and states:

⁵ "An EMPLOYER may make special payment to the FUND in order to add to the PENSIONABLE SERVICE of a MEMBER in his employ such period of past SERVICE as the BOARD, after consulting the ACTUARY, determine."

⁶ 24 of 1956

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"Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders, and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

[49] Rule 28⁷ deals with retrenchment, not early retirement. It applies in circumstances where the member is below the age of 65 years and is retired from service of the employer for operational reasons, namely a reduction in or reorganization of staff, the abolition of his office or post, to facilitate improvements in efficiency or organization or retrenchment generally.

[50] Rule 28(3)⁸ which applies only if a member has satisfied the requirements of Rule 28(1) require consultation between an employer and the Board of EPPF before the EPPF can be satisfied that the employee in question is entitled to retirement as contemplated in Rule 28(1). The EPPF never consulted with Eskom before it exercised its discretion as contemplated in Rule 28(3).

[51] Rule 24⁹ deals with early retirement and sets out the circumstances under which employees are entitled to early retirement benefits. To qualify for such benefits an employee had to, amongst others, have been in the employ of Eskom for at least ten years and must have reached an age of 55 years.

[52] Mr. Molefe does not fall within the category of section 28(1) as he was not "retrenched," nor had he completed not less than ten years' pensionable service. Rules 23 and 24 could not be applied as Mr. Molefe had not reached the age of 55 years. He was 50 and not a permanent employee.

⁷ "(1) Subject to the provisions of subsections (2), (3) and (4) if a Member who has not attained the pensionable age is retired from the service owing to a reduction in or reorganization of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally, he shall be paid a benefit equal to three times his contributions plus ten per cent of his final average emoluments for each year of pensionable service before January 1950..

⁸ "If a member who had attained the age of 50 years... and has not less than ten years' pensionable service, he may instead be granted at the discretion of the Board after consulting the employer, as from the date of his leaving the service of his employer, a pension in respect of his pensionable service calculated in terms of rule 22, without reduction in terms of rule 24'."

⁹ "24 Notwithstanding the provisions of rule 23, a MEMBER may retire from the service after attaining the age of 55 years in which case he shall be entitled, as from the date of his retirement, to a PENSION in respect of his PENSIONABLE SERVICE to the date of retirement calculated in terms of rule 22 reduced by a factor equal to thirteen-fortieths of one per cent for each month by which the period from the date of his retirement to the date on which he would have-attained the PENSIONABLE AGE exceeds twenty-four months".

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[53] The Fund avers that it relied on the relationship of trust it had with Eskom and was satisfied on the basis of formal information provided by Eskom that Mr. Molefe had retired from service for reasons listed in Rule 28 and that the entry conditions contained in Rule 28(1) had been met and effected payment accordingly. This explanation extends incredulity.

[54] The Fund failed to independently assess whether Mr. Molefe's application for early retirement fell within Rule 28. Clause 1(2)(b) of the Constitution of the Fund stipulates that its operations shall have as its main objectives, among others, sound governance and faultless administration. The Fund has failed to comply with the Pension Fund Act or with the Rules of the EPPF.

[55] It has subsequently become common cause between the parties that the early retirement agreement which purported to permit Mr. Molefe to retire from Eskom on full pension benefits after only 15 months service at the age of 50 was unlawful in that it breached the Rules of the Eskom Pension Fund.

[56] There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr. Molefe to afford him pension benefits he was not entitled to. The scheme permitted Mr. Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr. Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ.

Whether Mr. Molefe resigned

[57] Mr. Molefe states that he was under a mistaken impression, common to him and Eskom regarding the age at which he could take early retirement in terms of Rule 24 of the EPPF. He says that he relied on the EPPF Guide to Benefits which refers to early retirement (not retrenchment or retirement from service) being possible from the age of 50. He submits that his original contract of employment did not come to an end because when it was discovered that the Retirement Agreement was unlawful, the *status quo*, being his employment as Group Chief Executive - was restored by operation of the law.

[58] On his version, the mistake relates to his entitlement to early retirement, not his resignation which became effective on 31 December 2016. An application for early retirement is a resignation. An employee cannot retire and resign. Mr. Molefe's decision to leave was not conditional in any way and had nothing to do with the early retirement agreement; the agreement had not yet been concluded when he announced that he would leave Eskom and he had no reason to believe that the Board would accept his application for early retirement. If the application was refused, he would not have been entitled to return to Eskom as the employment relationship had terminated.

[59] In terms of clause 21 of the employment contract, Mr. Molefe is deemed to have resigned as a director of Eskom on the termination date.

[60] Mr. Molefe could not lawfully be appointed a member of Parliament if he was in the service of the state in terms of section 47(1)(a)¹⁰ of the Constitution, accordingly, the alleged common mistake, if any, could not have impacted on his decision to resign. His reasons for leaving Eskom is indicated in his statement of 11 November 2016, namely

"I have, in the interest of good corporate governance, decided to leave my employ Eskom from 1 January 2017. I do so voluntarily.

....

I will take time off to reflect before I decide on my next career move.

...

I go now because it is in the interest of Eskom and the public it serves that I do so (emphasis added)

[61] He, correctly in our view, wanted to avert the harm that will be done to Eskom if he remained in office while these allegations remain unresolved. He stated that he

¹⁰ 47. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except—

1. (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than ...

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left Eskom for purposes of clearing his name on the assumption that he would be able to do so within a reasonable time. Mr. Molefe noted that the process of establishing a Commission of Inquiry might take time and that:

"In the meantime, harm is done - to the institution; it has been my honor to lead the most difficult times, to its reputation and my own. I say nothing of the harm, too, to others close to me."

[62] Mr. Molefe's resignation was accepted by the Minister, who is the only representative shareholder of Eskom, she indicated in her statement on the same day that she respected Mr. Molefe's decision to resign. Mr. Molefe never corrected the Minister on her understanding that he had resigned. He never informed her that he was leaving his employ as a result of an early retirement agreement he concluded with Eskom. The alleged common mistake was in any event between Mr. Molefe and Eskom and not with the Minister who is the representative of the employer.

[63] On the same day, Eskom issued a Media Statement headed "Eskom GCE Brian Molefe voluntarily steps down." Eskom announced its "great sense of loss and regret" that Mr. Molefe had decided to "step down in the interest of good corporate governance... To clear his name following the release of former Public Protector Thuli Madonsela's report on her 'observations' about the so-called state capture."

[64] Eskom also accepted that Mr. Molefe had resigned. It submitted to the Companies and Intellectual Property Commission ("CIPC") the minutes of the Board meeting dated 29 November 2016 recording that the Board had resolved to accept Mr. Molefe's resignation.

[65] In our view, Mr. Molefe terminated his employment relationship with Eskom either by retirement or resignation. The contention that Mr. Molefe's original contract of employment did not come to an end is a contrived and is manifestly false.

Whether the purported Reinstatement Agreement was lawful.

[66] Mr. Molefe contends that his return to Eskom did not involve the decision by the Minister, but a restoration of the *status quo* as a matter of law as a consequence of a common mistake. This he argues did not constitute an appointment as contemplated in clause 14.3.1 of the Memorandum of Incorporation.

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[67] The early Retirement Agreement and the Reinstatement Agreement are employment contracts subject to the provisions of the 2016 MOI. It is the government represented by the Minister that has the power to appoint the Group Chief Executive Officer to the exclusion of the Board. The Minister was not noted as a party to the Agreements as required in terms of clause 14.3.4 of the 2016 MOI. Eskom did not obtain the Minister's consent or approval before concluding the Reinstatement Agreement. The Reinstatement Agreement is accordingly *ultra vires* and unlawful.

[68] It is trite that the exercise of public power is only legitimate where it is lawful and where a rational relationship exists between the exercise of the power and the purpose for which the power was given. In **Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others**¹¹ Chaskalson CJ said the following:

"It is a requirement of the law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[69] In **Affordable Medicines Trust v Minister of Health**¹² Ngcobo J held:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

[70] The Minister stated that the R30.1 million pension payment proposal had no legal rationale and was unlawful. She requested Eskom to renegotiate a package with Mr. Molefe which would be less expensive and which would also ameliorate Mr. Molefe's financial prejudice. Eskom subsequently presented the Minister with four options.

¹¹ [2000] ZACC 1; 2000 (2) SA 674 (CC) para 85

¹² 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49


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[71] The Board indicated that its preferred option was consensual rescission which would, according to the Board, mean that there would be a restoration of the *status quo ante*. Eskom ignored the allegations against Mr. Molefe contained in the Public Protector's report because it regarded them as irrelevant to whether or not he should be reinstated as Group Chief Executive officer because they were "not findings" and the Public Protector did not take any remedial action against Mr. Molefe.

[72] The Minister accepted rescission of the early retirement agreement and the restoration of the *status quo ante*, as it was a better "value proposition for the South African *fiscus*." She stated that Mr. Molefe was reinstated "in exchange" for repayment of the monies that he had received under the early retirement agreement. There is no rational reason to reinstate Mr. Molefe in exchange for the return of an unlawfully received benefit.

[73] Having concluded that there was no legal rationale for the pension arrangement and that it was unjustifiable, it was irrational for the Minister to approve the reinstatement of Mr. Molefe as a better value proposition to an unlawful pension proposal. The correct approach would have been to refuse the pension payout proposal out of hand. There was no obligation on the Minister to incur the burden of an unlawful obligation on behalf of Eskom.

[74] One of the four options provided to the Minister by the Board was to review the Reinstatement Agreement in court proceedings. As an organ of state Eskom is obliged by the Constitution to approach a court to have its unconstitutional act or decision declared invalid and set aside. The Constitutional Court in **State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited**¹³ held that PAJA does not apply to an organ of state seeking to review its own decision. An organ of state must instead do so under the principle of legality as [Section 33 of the Constitution creates the right to just administrative action to be enjoyed by private persons only as the State is the bearer of obligations under that

¹³ (CCT254/16) [2017] ZACC 40 (14 November 2017)



section and cannot be a beneficiary of the rights under Section 33 (being rights to administrative action that is lawful, reasonable and procedurally fair.

[75] The Reinstatement Agreement is irrational because the Minister was deceived about the nature of the decision that was being taken and its legal and factual background. The Minister says *"I was under the impression that this was a case of unilateral resignation and nothing more."* The Minister was not aware that the early retirement agreement had been concluded, she knew nothing about Mr. Molefe's R30 million pension payout and Dr. Ngubane had already signed the Reinstatement Agreement when he sent it to the Minister.

[76] Mr. Molefe accepted that the allegations against him were so serious that they warranted his resignation in the interest of Eskom and good corporate governance. The allegations are directly relevant to the rationality and legality of his reinstatement as Group Chief Executive officer. Eskom acted irrationally in failing to consider how his reinstatement could now be in the interest of Eskom and good governance after Mr. Molefe acknowledged that the serious allegations were a reason for his resignation.

[77] Eskom says that it would have been inappropriate to have acted against Mr. Molefe on the basis of the untested allegations contained in the Public Protectors report. At the time of announcing his resignation, Mr Molefe, Eskom and the Minister correctly in our view, conveyed an acceptance that the allegations against Mr. Molefe were so serious as to warrant his immediate resignation so that he could have an opportunity to clear his name, and that his immediate resignation was in the interest of Eskom and good corporate governance.

[78] It was not possible for Eskom to take a rational decision about whether to reinstate Mr. Molefe without at least investigating the veracity of the allegations as it has control over all the relevant evidence and the allegations are plainly material to Mr. Molefe's suitability for the position of Group Chief Executive Officer of Eskom.

[79] Mr. Molefe contends that the Public Protector's report contains observations, not binding findings. He argues that the observations, framed by the Public Protector as interrogatories, were intended to be determined by the Judicial Commission of



Enquiry and he was not given an opportunity to respond to the Public Protector's observations before the report was published.


[80] The allegations against Mr. Molefe contained in the Public Protector's report are so serious that they were the reason for his resignation. The allegations are highly relevant to Mr. Molefe's suitability to be reinstated as GCEO. They are a dead weight that he must carry until he is cleared. In the absence of new facts that arose in the interim to lift the dead weight that motivated the need for Mr. Molefe to resign in the first place, the allegations in the Public Protector's report cannot just be ignored by the Minister or Eskom. The Minister and Eskom acted irrationally in ignoring the damning allegations in the Public Protector's report.

[81] We find that the reinstatement of Mr. Molefe as Group Chief Executive Officer at Eskom is at variance with the principle of legality and is invalid and falls to be set aside.

[82] We also find that Mr. Molefe was never entitled to receive any pension benefits from Eskom Pension Fund and any payments made in lieu of such benefits were patently unlawful.

[82] In the result, the following order is made

- a. the decision taken by the Board of Eskom in November 2016 to accept Mr. Molefe's "early retirement" proposal is reviewed and set aside.
- b. The decision made by the Minister to appoint and reinstate Mr. Molefe to the position of Group Chief Executive at Eskom is reviewed and set aside.
- c. It is declared that any payment or sum of money received by Mr. Molefe under any purported pension agreement between him and Eskom is invalid and Mr. Molefe is ordered to repay such amounts within ten days of this order.
- d. Mr. Molefe is ordered to pay the costs including the costs of two counsel where employed.



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K E MATOJANE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



H J FABRICIUS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



S S MPHAHLELE
JUDGE OF THE HIGH COURT



GAUTENG DIVISION, PRETORIA

HEARD ON

29 AND 30 NOVEMBER 2017

JUDGMENT DATE

FOR THE DEMOCRATIC ALLIANCE P KENNEDY SC

with N FERREIRA, K HARDING
AND L ZIKALALA

INSTRUCTED BY

FOR THE SOLIDARITY TRADE UNION

INSTRUCTED BY

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ESKOM HOLDINGS SOC LTD
BOARD PEOPLE & GOVERNANCE COMMITTEE: IN-COMMITTEE
221-209

Unique Identifier

Document Type CCGTE
Revision 0
Effective Date July 2015

Office of the Company Secretary

**MINUTES OF THE BOARD PEOPLE & GOVERNANCE IN-COMMITTEE MEETING 07/2015-16
HELD ON TUESDAY 9 FEBRUARY 2016 IN THE HUVO NKULU BOARD ROOM, EXECUTIVE
FLOOR, MEGAWATT PARK**

STRICTLY CONFIDENTIAL

PRESENT

MEMBERS

Ms V Klein	Chairperson
Ms N Carrim	Member
Mr B Molefe	Group Chief Executive ("GCE")
Dr B S Ngubane	Member
Mr Z Khoza	Member
Ms C Mabude	Member

OFFICIALS

Mr A Minnaar	Executive Support Manager
Ms S Daniels	Company Secretary

APOLOGIES

Mr L Giovanni	Member
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1. OPENING AND WELCOME

The Chairperson opened the meeting and welcomed all those present.

2. APOLOGIES

Apologies as above were noted.

3. QUORUM

A quorum being present, the Chairperson declared the meeting duly constituted.

4. DECLARATION OF INTERESTS

There were no declarations pertaining to items on the agenda and a declarations of interest register was circulated for signature.


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5. SAFETY AND EVACUATION

The safety and evacuation procedure to be followed in the event of an emergency had been presented in the standard Committee meeting.

6. ADOPTION OF THE AGENDA

The agenda as tabled was adopted.

7. MATTERS FOR APPROVAL OR INFORMATION
**7.1. Office of the Group Chief Executive
 F Band and Non-Executive Directors' Remuneration Review**

Mr Minnaar addressed the meeting and reported on the status of the implementation of the DPE Remuneration Standards. He reminded the meeting that at the committee meeting held in September 2015 it had been resolved that Eskom would implement the revised DPE Remuneration Standards and a letter from the Chairman of the Board to the Minister in October 2015 requested approval for the proposed approach. To date no response had been received on the letter from DPE which resulted in a delay in the finalisation of the Eskom remuneration policy. This situation has now posed a number of challenges including:

- outstanding non-executive directors' fees;
- no salary adjustments made in respect of the F Band employees in 2015;
- no LTI awards after 2014/15 resulting in no further pay-outs after 31 March 2016.

All of the above was resulting in Eskom lagging behind the market.

The following resolutions were thus being requested:

- to continue with the existing Eskom remuneration practices in the absence of a response from the Minister;
- to issue the outstanding 2014/15 LTI grants; and
- to recommend an increase in the fees for non-executive directors and prescribed officers.

The meeting discussed the matter, including the remuneration practices relating to the STI and LTI schemes. The GCE enquired over the triggers for LTI grants. In response to a request from the meeting, Mr Minnaar presented the salient features of the LTI as previously approved noting that it covered a three year period. He explained that the STI looked at performance over a 12 month period. Mr Minnaar noted the discretion of the GCE in the award of LTI grants. The GCE enquired over the detail of the said discretion considering the past performance of the business. He explained the link between the STI and LTI schemes, noting that the STI was a gatekeeper to the LTI. In the absence of performance, an executive would not be incentivised to stay on in the company.


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The Chairperson noted that the rules could not be changed retrospectively but only going forward. The GCE noted that in his view guidance would be required as to the extent and the exercise of the discretion in this regard. The Chairperson again noted that in her opinion in respect of the past two years, the rules that were in place had to be applied. The GCE suggested that the focus should be on the way forward rather on the historic position. He noted that he had a particular view on the matter but required expert guidance as to the practical implications thereof.

The Chairperson again pointed out that the non-allocation over the past 2 years needed to be considered. Mr Minnaar explained the thinking behind the moratorium on grants while DPE approval was awaited. The Chairperson suggested that a special Committee meeting be arranged in order to finalise this matter. She enquired as to whether the Committee was comfortable with the same principles underlying grants being applied retrospectively in respect of the 2014/15 grants. In response to a question from Ms Mabude, Mr Minnaar explained that grants for 2014 and 2015 would be paid-out in 2017 and 2018.

The Chairperson enquired over the approach in respect of employees who were no longer in the company's employment and where settlements had been agreed. It was noted that there should be no further obligations to such employees. The Chairperson also noted that no payments would be made now but only awards made. The meeting debated the matter and the Chairperson enquired over whether the matter should be held back for now.

RESOLVED THAT:

7.1.1 the matters raised as part of the discussion be held over until the special Committee meeting to be scheduled.

7.2. Office of the Group Chief Executive
Implementation date for increases of F Bands

Mr Minnaar explained the background to the matter. Increases were now being approved by the Minister at the Annual General Meeting each year but only implemented in October of every year. From a chronological point of view this was not making sense and needed to be synchronised. He noted that no increase was awarded in 2015. The request was for increases of F Band salaries to be implemented with effect from 1 April each year.

The Chairperson noted that bringing the increase date forward would to some extent soften the blow of no increase having been given in 2015. However, this matter needed to be further discussed with the Minister. The GCE also shared his views in this regard, sharing the concern of the Chairperson. It was agreed that relevant information had to be provided to the Minister in advance of the meeting.

RESOLVED THAT:

7.2.1 the increase date of F Bands be brought forward to 1 April each year.

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 221-209

Unique Identifier

 Document Type CCGTE
 Revision 0
 Effective Date July 2015

Office of the Company Secretary

**7.3. Office of the Group Chief Executive
Proposed salary increases**

Mr Minnaar explained the nature and extent of market survey that had been undertaken in October 2015 and had been submitted to the Committee for information purposes. He noted that the request now was to consider the level of increases going forward. The overall executive increases for 2014/15 was 6.6% while the actual increases recorded were 7.1%. The market trend seemed to be way above CPI. Preliminary indications for increases of executive remuneration packages for 2015/16 were around 6.5%. Mr Minnaar noted that he had done a comparison from August 2010 between market trends, CPI and Eskom increases. He presented the findings to the meeting noting the sources of benchmarking information.

Mr Minnaar proposed a 5% increase on executive remuneration effective 1 April 2016 to be submitted to the Minister. The Chairperson requested that the letter to the Minister should acknowledge the pressure currently being exerted in this regard by various parties.

RESOLVED THAT:

- 7.3.1 a proposed increase of 5% on executive remuneration effective 1 April 2016 be recommended to the Minister of Department of Public Enterprises for approval.

**7.4 Office of the Group Chief Executive
Non-executive directors' fees**

Mr Minnaar presented the matter, noting that members were in fact conflicted as this matter related to their own income. Notwithstanding, in his view the matter needed to again be raised as current payment practices were not aligned with market trends or King III recommendations. Again, the lack of response from the office of the Minister was resulting in a delay in implementation of the revised DPE Remuneration Standards as far as board fees were concerned.

The CGE was excused from the meeting.

Mr Minnaar presented the current fee structure based on the old guidelines. In the absence of a response from the Minister, the request was to align the Eskom Board fee structure with that of Transnet as approved by DPE. He compared the fee structures of these two entities and proposed that the Minister be requested to align the fee structures. The Chairperson noted that this matter had been informally discussed with the Minister the previous year who had noted her support for such a proposal subject to due process being followed. However, again considering the current challenges, the timing of these increases was a major concern to the Minister.

RESOLVED THAT:

- 7.4.1 the alignment of the Board fee structure between that of Eskom and Transnet be recommended to the Minister of Department of Public Enterprises for approval.

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221-209

Unique Identifier

Document Type CCGTE
Revision 0
Effective Date July 2015

Office of the Company Secretary

The Chairperson noted the significant efforts of the Board Chairman to date to correct the misaligned Board fee structure.

7.5 Group Chief Executive: Conclusion of contract

Mr Minnaar reminded the meeting that the Minister had requested that the contract be concluded for a 5 year period and that she had also requested to have oversight over the contract. In addition, Eskom was given until the end of January 2015 to conclude the matter. A letter had however been addressed to the Minister regarding the retirement of the GCE and a response was awaited.

Mr Minnaar noted that a fixed term contract of 5 years at this level was a first for Eskom and was also not aligned with best practice. He explained the negative impact of this on the retirement benefits of the relevant individuals (GCE and CFO) and proposed that approval be granted for remedial action based on past practices and precedents in Eskom to counter this impact, which could include additional pensionable service being granted and/or penalties being waived. Mr Minnaar quoted a number of examples where this had been done in Eskom in the past.

Mr Minnaar thereafter spelled out the required resolution noting the current rule that staff over 50 years of age with at least 10 years' service were entitled to retire. The request was for the rules to be amended in respect of executive directors with fixed term contracts to make up the shortfall in years, wave the penalties and refund to the Pension and Provident Fund the actual cost relating to the additional service. He explained that refunding the cost would not reflect as emoluments of the executive director in question as this would constitute a transaction between Eskom and the Fund only with no money being paid to the individual.

The Chairperson summarised her understanding of the proposal as far as it would relate to the GCE. In respect of the CFO, the matter would be more complicated as he would not be 50 years of age at the time that the fixed term contract came to an end. The meeting enquired whether a proposal could be considered for the CFO and tabled for consideration in due course.

RESOLVED THAT:

- 7.5.1 the Committee approved the proposed change in the rules of the Eskom Pension and Provident Fund ("the Fund") in respect of an executive with a fixed term contract to make up the shortfall in the required 10 years, wave the penalties and refund the cost relating to the additional service to the Fund;
- 7.5.2 the application of the revised rule as approved in item 7.5.1 above in respect of the Group Chief Executive, be and is hereby approved; and
- 7.5.3 a proposal in respect of the Chief Financial Officer to be considered and submitted to the Committee in due course.



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BOARD PEOPLE & GOVERNANCE COMMITTEE: IN-COMMITTEE
 221-209

Unique Identifier

Document Type CCGTE
 Revision 0
 Effective Date July 2015

Office of the Company Secretary

8. CONFIRMATION OF MINUTES OF THE PREVIOUS MEETING

8.1 Minutes of the Previous Meeting
Reference Document 5.1(a)

The minutes of the In-Committee meeting No. 06-2015/16 held on 22 October 2015, having been circulated, were considered. The Chairperson requested that the minutes be carefully reviewed to ensure correctness. She noted, for example, an error in the minutes that needed to be corrected. The Company Secretary confirmed that the wording of the relevant item would be revised accordingly. The Chairperson furthermore noted that discussions around the travel policy and appointment of non-executive directors on the board of subsidiary companies had been discussed. The Company Secretary was requested to consider the matter based on the provisions of the Eskom Memorandum of Incorporation.

RESOLVED THAT:

1. the minutes of the People and Governance Committee In-Committee meeting No. 06-2015/16 held on 22 October 2015 are approved as an accurate reflection of the proceedings, subject to the proposed amendments; and
2. the Chairperson of this meeting is duly authorised to sign the minutes.

9. MATTERS ARISING FROM PREVIOUS MINUTES

9.1 Matters arising
Reference Document 6.1(a)

The Action List as included in the meeting papers was **NOTED**.

10. GENERAL

There were no further matters for discussion.

11. CLOSURE

There being no further matters for discussion the Chairperson declared the meeting closed.

SIGNED AS A CORRECT RECORD OF THE PROCEEDINGS

CHAIRPERSON

DATE

STATEMENT

On Wednesday 2 November 2016, a report entitled 'State of Capture' prepared by the former Public Protector, Advocate Thuli Madonsela, was released.

The report did not make any findings. Instead it made what were termed "observations", based, (the report acknowledged), on an investigation not completed. It deferred a proper investigation to a commission of inquiry to be established at a future date. The outgoing Public Protector has directed the President – in whom the Constitution vests the power to appoint commissions of inquiry - to appoint one, and further directed the Chief Justice to designate a particular judge to head it.

It is a matter for regret that the report was prepared in haste to meet a deadline related to the Public Protector's own departure from office. That her office continues, as all State offices do, and that any uncompleted function is completed by a successor in that office, was not a consideration in the report.

"Observations" made in the report relating to, inter alia, my conduct, are in material respects inaccurate, based on part-facts or simply unfounded. What the previous Public Protector has done is not herself to investigate to completion, or to allow her office to complete what she initiated too late to complete herself. She has also determined on recording "observations" without, in crucial respects, putting intended harmful disclosures to me first – as she was by law required to do. She has effectively deferred my constitutional right to be heard to a future date, and to a further body, which she has ordered others to assemble.

If such a body is indeed by law to be assembled, and carry out the task, it will not be for some time – as recent experience indicates.

In the meanwhile harm is done – to the institution it has been my honour to lead in the most difficult times, to its reputation and to my own. I say nothing of the harm, too, to others close to me.

I am confident that, when the time comes, I will be able to show that I have done nothing wrong and that my name will be cleared. I shall dedicate myself to showing that an injustice has been done by the precipitate delivery of 'observations', following an incomplete

investigation, which the former Public Protector has drawn back from calling 'findings'. The truth will out.

I have, in the interests of good corporate governance, decided to leave my employ at Eskom from 1 January 2017. I do so voluntarily: indeed, I wish to pay tribute to the unfailing support I have had since I took up office from the chairman, the Board and with those with whom it has been my privilege to work. Together we brought Eskom back from the brink.

I will take time off to reflect before I decide on my next career move.

I wish to reiterate that this act is not an admission of wrongdoing on my part. It is rather what I feel to be the correct thing to do in the interests of the company and good corporate governance.

I wish to thank the shareholder representative, Ms Lynn Brown, the board, the executive team and all Eskom employees for their hard work and guidance in steering the company out of very difficult times during the twenty months that I was privileged to be the Group Chief Executive.

I go now, because it is in the interests of Eskom and the public it serves, that I do so.

Brian MOLEFE

11 November 2016